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Ontario

Workers' Compensation
Appeals Tribunal

Tribunal d'appel
des accidents du travail



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Workers' Compensation Appeals Tribunal

Decision Digest Service

Volume 1

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DECISION NO. 306/90	(05/06/90)		155
DECISION NO. 307/90*	(15/01/91)	17 WCATR 127	392
DECISION NO. 308/90	(18/07/90)		203
DECISION NO. 311/90I	(15/06/90)		169
DECISION NO. 312/90	(15/04/91)		504
DECISION NO. 313/90	(01/06/90)		154
DECISION NO. 313/90R	(16/08/90)		215
DECISION NO. 314/90	(09/05/90)		133
DECISION NO. 315/90	(09/05/90)		134
DECISION NO. 316/90	(23/01/91)		401
DECISION NO. 317/90	(15/05/90)		140
DECISION NO. 319/90	(24/05/90)		147
DECISION NO. 320/90	(06/06/90)		157
DECISION NO. 321/90	(28/11/90)		333
DECISION NO. 322/90	(09/05/90)		133
DECISION NO. 323/90	(05/06/90)		154
DECISION NO. 324/90	(25/05/90)		148
DECISION NO. 325/90	(20/06/90)		173
DECISION NO. 326/90I	(14/02/91)		426
DECISION NO. 327/90	(05/07/90)		190
DECISION NO. 328/90	(25/03/91)		472
DECISION NO. 329/90	(14/05/90)		137
DECISION NO. 330/90	(29/06/90)		183
DECISION NO. 331/90	(16/01/91)		395
DECISION NO. 332/90	(24/05/90)		147
DECISION NO. 333/90	(07/06/90)		157
DECISION NO. 334/90	(08/06/90)		158
DECISION NO. 335/90	(06/06/90)		156
DECISION NO. 336/90I	(05/06/90)		155
DECISION NO. 336/90	(12/02/91)		423
DECISION NO. 337/90	(09/08/90)		211
DECISION NO. 338/90	(28/01/91)		405
DECISION NO. 339/90	(18/07/90)		203
DECISION NO. 341/90I	(24/04/91)		523
DECISION NO. 342/90	(24/05/90)		146
DECISION NO. 343/90	(07/06/90)		157
DECISION NO. 344/90	(16/11/90)		317
DECISION NO. 345/90	(07/06/90)		158
DECISION NO. 346/90	(20/08/90)		227

DECISION NO. 347/90	(22/08/90)	232
DECISION NO. 348/90I	(11/05/90)	136
DECISION NO. 349/90	(11/04/91)	499
DECISION NO. 351/90*	(05/12/90) 17 WCATR 143	349
DECISION NO. 352/90	(14/05/90)	137
DECISION NO. 353/90	(14/05/90)	137
DECISION NO. 354/90	(14/05/90)	137
DECISION NO. 355/90	(14/05/90)	136
DECISION NO. 357/90	(06/06/90)	157
DECISION NO. 358/90	(14/06/90)	168
DECISION NO. 359/90	(06/06/90)	156
DECISION NO. 360/90	(01/08/90)	219
DECISION NO. 361/90	(20/12/90)	373
DECISION NO. 362/90*	(23/06/90) 15 WCATR 195	177
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DECISION NO. 364/90	(07/08/90)	221
DECISION NO. 365/90	(06/07/90)	192
DECISION NO. 366/90	(06/07/90)	192
DECISION NO. 367/90	(06/07/90)	192
DECISION NO. 368/90	(14/06/90)	168
DECISION NO. 369/90	(19/06/90)	171
DECISION NO. 370/90	(18/06/90)	170
DECISION NO. 371/90	(19/06/90)	171
DECISION NO. 373/90*	(21/06/90) 15 WCATR 202	174
DECISION NO. 374/90	(29/06/90)	184
DECISION NO. 374/90R	(20/11/90)	322
DECISION NO. 374/90R2	(14/01/91)	390
DECISION NO. 375/90	(05/10/90)	270
DECISION NO. 376/90	(29/06/90)	183
DECISION NO. 377/90	(03/04/91)	488
DECISION NO. 378/90	(10/07/90)	195
DECISION NO. 379/90	(10/07/90)	195
DECISION NO. 380/90	(10/07/90)	195
DECISION NO. 381/90	(13/07/90)	199
DECISION NO. 382/90I	(14/06/90)	168
DECISION NO. 383/90	(08/06/90)	160
DECISION NO. 384/90I	(17/08/90)	224
DECISION NO. 384/90I2	(19/12/90)	369
DECISION NO. 385/90	(30/08/90)	236
DECISION NO. 386/90*	(18/10/90) 16 WCATR 236	284
DECISION NO. 387/90L	(04/07/90)	190
DECISION NO. 387/90	(27/02/91)	441
DECISION NO. 388/90	(06/07/90)	192
DECISION NO. 389/90	(05/07/90)	189

DECISION NO. 390/90	(05/11/90)	301
DECISION NO. 391/90	(03/07/90)	183
DECISION NO. 392/90	(21/06/90)	174
DECISION NO. 393/90	(21/06/90)	174
DECISION NO. 394/90	(21/06/90)	174
DECISION NO. 395/90	(21/06/90)	174
DECISION NO. 396/90	(18/06/90)	171
DECISION NO. 397/90	(26/06/90)	178
DECISION NO. 398/90	(10/09/90)	245
DECISION NO. 399/90L	(21/08/90)	227
DECISION NO. 400/90	(31/01/91)	414
DECISION NO. 401/90	(18/10/90)	285
DECISION NO. 402/90	(08/06/90)	158
DECISION NO. 403/90I	(12/06/90)	164
DECISION NO. 405/90*	(17/09/90) 16 WCATR 244	254
DECISION NO. 406/90	(25/10/90)	293
DECISION NO. 407/90	(27/06/90)	179
DECISION NO. 408/90	(27/06/90)	179
DECISION NO. 409/90	(22/08/90)	228
DECISION NO. 410/90*	(15/06/90) 15 WCATR 211	170
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DECISION NO. 412/90I	(27/06/90)	181
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DECISION NO. 414/90	(18/06/90)	171
DECISION NO. 415/90	(05/10/90)	271
DECISION NO. 416/90	(21/06/90)	175
DECISION NO. 417/90	(22/06/90)	176
DECISION NO. 417/90R	(25/10/90)	293
DECISION NO. 418/90	(14/12/90)	362
DECISION NO. 419/90L	(10/08/90)	213
DECISION NO. 420/90	(28/06/90)	182
DECISION NO. 421/90	(20/06/90)	173
DECISION NO. 422/90*	(20/06/90) 15 WCATR 217	172
DECISION NO. 423/90	(20/06/90)	172
DECISION NO. 424/90	(20/06/90)	172
DECISION NO. 425/90	(10/07/90)	196
DECISION NO. 427/90*	(27/03/91) 18 WCATR 196	478
DECISION NO. 428/90	(17/07/90)	204
DECISION NO. 429/90	(29/06/90)	182
DECISION NO. 430/90	(06/07/90)	192
DECISION NO. 431/90*	(14/06/90) 15 WCATR 221	168
DECISION NO. 432/90	(05/07/90)	192
DECISION NO. 433/90	(31/08/90)	238
DECISION NO. 434/90	(31/08/90)	238

DECISION NO. 435/90	(31/08/90)	238
DECISION NO. 436/90	(04/09/90)	239
DECISION NO. 438/90	(22/08/90)	231
DECISION NO. 439/90	(17/07/90)	202
DECISION NO. 440/90	(26/06/90)	179
DECISION NO. 441/90	(15/11/90)	315
DECISION NO. 442/90*	(13/12/90) 17 WCATR 158	357
DECISION NO. 443/90*	(05/11/90) 16 WCATR 253	302
DECISION NO. 447/90	(04/07/90)	187
DECISION NO. 448/90	(25/07/90)	208
DECISION NO. 449/90	(20/07/90)	206
DECISION NO. 450/90	(24/07/90)	207
DECISION NO. 451/90	(05/07/90)	189
DECISION NO. 453/90	(11/10/90)	277
DECISION NO. 454/90	(17/07/90)	204
DECISION NO. 455/90	(03/07/90)	186
DECISION NO. 458/90L	(26/07/90)	209
DECISION NO. 459/90	(27/07/90)	210
DECISION NO. 461/90	(15/08/90)	214
DECISION NO. 462/90	(27/06/90)	179
DECISION NO. 463/90	(08/02/91)	421
DECISION NO. 464/90*	(24/01/91) 17 WCATR 167	402
DECISION NO. 465/90	(08/03/91)	452
DECISION NO. 466/90	(27/06/90)	181
DECISION NO. 467/90	(27/06/90)	180
DECISION NO. 468/90	(27/06/90)	180
DECISION NO. 469/90	(27/06/90)	180
DECISION NO. 470/90	(21/09/90)	258
DECISION NO. 471/90	(06/09/90)	240
DECISION NO. 472/90	(10/09/90)	244
DECISION NO. 473/90	(12/07/90)	198
DECISION NO. 475/90	(03/07/90)	186
DECISION NO. 476/90	(02/04/91)	486
DECISION NO. 477/90	(20/11/90)	323
DECISION NO. 478/90	(17/08/90)	224
DECISION NO. 479/90	(31/07/90)	217
DECISION NO. 480/90	(10/07/90)	194
DECISION NO. 481/90	(23/11/90)	328
DECISION NO. 484/90	(15/08/90)	223
DECISION NO. 485/90*	(03/01/91) 17 WCATR 173	381
DECISION NO. 486/90	(31/07/90)	217
DECISION NO. 487/90	(31/07/90)	217
DECISION NO. 488/90	(31/07/90)	217
DECISION NO. 489/90	(31/07/90)	217

DECISION NO. 490/90	(05/11/90)	303
DECISION NO. 491/90	(04/07/90)	191
DECISION NO. 492/90	(07/11/90)	308
DECISION NO. 493/90	(12/09/90)	248
DECISION NO. 494/90*	(13/07/90) 15 WCATR 228	199
DECISION NO. 495/90	(31/10/90)	296
DECISION NO. 496/90	(23/04/91)	521
DECISION NO. 497/90	(27/09/90)	263
DECISION NO. 500/90	(17/04/91)	513
DECISION NO. 501/90	(25/07/90)	208
DECISION NO. 502/90*	(06/03/91) 18 WCATR 237	450
DECISION NO. 503/90	(22/08/90)	229
DECISION NO. 504/90	(20/08/90)	231
DECISION NO. 505/90	(26/03/91)	473
DECISION NO. 506/90	(07/12/90)	351
DECISION NO. 507/90	(08/11/90)	309
DECISION NO. 508/90	(24/09/90)	259
DECISION NO. 509/90L	(30/07/90)	216
DECISION NO. 509/90I	(17/04/91)	514
DECISION NO. 510/90	(30/07/90)	216
DECISION NO. 511/90I	(10/09/90)	244
DECISION NO. 511/90	(28/03/91)	483
DECISION NO. 512/90	(02/08/90)	220
DECISION NO. 513/90	(17/07/90)	202
DECISION NO. 514/90	(10/10/90)	274
DECISION NO. 515/90	(10/08/90)	212
DECISION NO. 516/90	(10/08/90)	212
DECISION NO. 518/90	(23/08/90)	229
DECISION NO. 519/90	(20/07/90)	206
DECISION NO. 521/90I	(17/07/90)	201
DECISION NO. 523/90	(17/07/90)	202
DECISION NO. 525/90	(02/08/90)	221
DECISION NO. 526/90	(27/07/90)	210
DECISION NO. 528/90	(26/07/90)	209
DECISION NO. 529/90I	(10/09/90)	252
DECISION NO. 530/90	(25/10/90)	293
DECISION NO. 531/90	(23/08/90)	230
DECISION NO. 532/90	(10/09/90)	245
DECISION NO. 533/90	(10/09/90)	252
DECISION NO. 534/90I*	(04/12/90) 17 WCATR 187	346
DECISION NO. 535/90I	(11/04/91)	500
DECISION NO. 536/90	(13/09/90)	251
DECISION NO. 537/90L	(28/01/91)	406
DECISION NO. 538/90	(13/08/90)	214

DECISION NO. 539/90	(10/10/90)	275
DECISION NO. 540/90L	(27/07/90)	210
DECISION NO. 541/90	(27/07/90)	210
DECISION NO. 542/90	(01/08/90)	219
DECISION NO. 543/90	(28/08/90)	233
DECISION NO. 544/90	(24/07/90)	207
DECISION NO. 545/90	(10/09/90)	243
DECISION NO. 546/90	(10/09/90)	243
DECISION NO. 547/90	(17/09/90)	254
DECISION NO. 548/90	(10/09/90)	243
DECISION NO. 550/90	(22/08/90)	228
DECISION NO. 551/90	(03/10/90)	268
DECISION NO. 552/90	(01/11/90)	299
DECISION NO. 553/90I	(01/08/90)	218
DECISION NO. 553/90	(19/12/90)	369
DECISION NO. 554/90	(25/07/90)	208
DECISION NO. 555/90	(09/08/90)	211
DECISION NO. 556/90I	(26/11/90)	329
DECISION NO. 558/90	(09/10/90)	272
DECISION NO. 559/90	(01/08/90)	219
DECISION NO. 560/90*	(27/12/90) 17 WCATR 236	377
DECISION NO. 561/90	(27/02/91)	145
DECISION NO. 563/90I	(08/08/90)	222
DECISION NO. 564/90	(03/10/90)	268
DECISION NO. 565/90	(06/11/90)	305
DECISION NO. 566/90*	(30/11/90) 17 WCATR 249	342
DECISION NO. 567/90	(05/11/90)	303
DECISION NO. 568/90I	(15/08/90)	215
DECISION NO. 569/90	(10/09/90)	243
DECISION NO. 570/90	(14/11/90)	313
DECISION NO. 571/90	(16/11/90)	317
DECISION NO. 572/90	(13/11/90)	311
DECISION NO. 573/90	(05/10/90)	271
DECISION NO. 574/90	(10/09/90)	244
DECISION NO. 575/90	(11/10/90)	277
DECISION NO. 576/90	(14/12/90)	363
DECISION NO. 577/90	(03/10/90)	268
DECISION NO. 578/90	(16/08/90)	215
DECISION NO. 579/90	(07/12/90)	352
DECISION NO. 580/90	(24/09/90)	259
DECISION NO. 582/90	(28/09/90)	264
DECISION NO. 583/90	(20/08/90)	224
DECISION NO. 585/90	(17/10/90)	282
DECISION NO. 586/90	(10/09/90)	243

DECISION NO. 587/90	(10/09/90)	243
DECISION NO. 588/90	(18/09/90)	254
DECISION NO. 589/90	(10/09/90)	243
DECISION NO. 590/90	(04/09/90)	238
DECISION NO. 591/90	(04/09/90)	239
DECISION NO. 592/90	(04/09/90)	239
DECISION NO. 593/90	(04/09/90)	239
DECISION NO. 594/90	(17/09/90)	253
DECISION NO. 595/90	(17/09/90)	253
DECISION NO. 596/90	(17/09/90)	253
DECISION NO. 597/90	(17/09/90)	254
DECISION NO. 598/90L	(10/09/90)	252
DECISION NO. 600/90	(30/11/90)	343
DECISION NO. 601/90	(22/08/90)	228
DECISION NO. 604/90	(06/11/90)	306
DECISION NO. 606/90	(10/09/90)	244
DECISION NO. 607/90*	(31/08/90) 15 WCATR 236	237
DECISION NO. 608/90	(22/02/91)	436
DECISION NO. 609/90	(28/08/90)	233
DECISION NO. 610/90	(31/08/90)	237
DECISION NO. 611/90	(12/12/90)	356
DECISION NO. 612/90	(29/01/91)	410
DECISION NO. 616/90	(27/09/90)	262
DECISION NO. 617/90L	(12/09/90)	249
DECISION NO. 618/90	(12/09/90)	249
DECISION NO. 621/90	(11/09/90)	247
DECISION NO. 623/90	(11/10/90)	278
DECISION NO. 624/90	(18/09/90)	254
DECISION NO. 625/90	(18/09/90)	255
DECISION NO. 626/90	(18/09/90)	255
DECISION NO. 627/90	(18/09/90)	254
DECISION NO. 630/90I	(11/09/90)	247
DECISION NO. 631/90	(26/09/90)	260
DECISION NO. 632/90*	(01/10/90) 16 WCATR 268	265
DECISION NO. 633/90I	(03/10/90)	269
DECISION NO. 634/90	(01/10/90)	266
DECISION NO. 635/90L	(28/11/90)	333
DECISION NO. 637/90	(04/12/90)	348
DECISION NO. 638/90	(10/10/90)	275
DECISION NO. 639/90L	(26/11/90)	329
DECISION NO. 641/90	(03/10/90)	269
DECISION NO. 643/90	(03/10/90)	269
DECISION NO. 645/90	(28/11/90)	334
DECISION NO. 646/90	(28/11/90)	334

DECISION NO. 647/90	(06/11/90)	306
DECISION NO. 648/90	(12/09/90)	249
DECISION NO. 649/90	(09/10/90)	273
DECISION NO. 650/90	(16/04/91)	507
DECISION NO. 651/90	(28/11/90)	334
DECISION NO. 652/90	(05/11/90)	303
DECISION NO. 653/90*	(04/12/90) 17 WCATR 261	348
DECISION NO. 654/90I	(13/09/90)	250
DECISION NO. 655/90	(13/02/91)	425
DECISION NO. 656/90	(14/11/90)	313
DECISION NO. 657/90	(01/02/91)	415
DECISION NO. 658/90	(15/11/90)	315
DECISION NO. 660/90L	(20/11/90)	323
DECISION NO. 661/90	(22/01/91)	400
DECISION NO. 662/90*	(19/11/90) 16 WCATR 273	319
DECISION NO. 663/90	(17/10/90)	282
DECISION NO. 664/90	(18/10/90)	285
DECISION NO. 666/90	(10/10/90)	275
DECISION NO. 666/90R	(27/02/91)	442
DECISION NO. 667/90	(11/10/90)	278
DECISION NO. 669/90	(21/09/90)	257
DECISION NO. 670/90	(14/11/90)	313
DECISION NO. 671/90I*	(18/10/90) 16 WCATR 284	285
DECISION NO. 672/90	(09/11/90)	310
DECISION NO. 674/90*	(02/10/90) 16 WCATR 299	266
DECISION NO. 675/90L	(27/11/90)	330
DECISION NO. 677/90	(20/11/90)	324
DECISION NO. 678/90I	(19/09/90)	256
DECISION NO. 678/90	(30/11/90)	343
DECISION NO. 679/90	(25/09/90)	260
DECISION NO. 680/90	(30/11/90)	344
DECISION NO. 681/90	(19/11/90)	320
DECISION NO. 682/90	(05/10/90)	271
DECISION NO. 683/90	(09/10/90)	273
DECISION NO. 684/90	(09/10/90)	273
DECISION NO. 685/90	(15/10/90)	280
DECISION NO. 688/90	(08/11/90)	309
DECISION NO. 689/90	(25/09/90)	259
DECISION NO. 690/90	(12/10/90)	279
DECISION NO. 691/90	(19/10/90)	288
DECISION NO. 692/90	(11/10/90)	278
DECISION NO. 693/90	(27/09/90)	262
DECISION NO. 697/90*	(01/02/91) 17 WCATR 275	416
DECISION NO. 698/90	(07/11/90)	308

DECISION NO. 700/90	(15/10/90)	281
DECISION NO. 701/90	(14/12/90)	363
DECISION NO. 702/90	(28/12/90)	378
DECISION NO. 703/90	(28/09/90)	263
DECISION NO. 704/90L	(27/09/90)	264
DECISION NO. 705/90	(19/10/90)	288
DECISION NO. 706/90*	(30/01/91) 17 WCATR 287	412
DECISION NO. 708/90	(19/10/90)	288
DECISION NO. 709/90	(20/12/90)	374
DECISION NO. 710/90	(27/11/90)	331
DECISION NO. 711/90	(19/03/91)	464
DECISION NO. 713/90	(26/03/91)	474
DECISION NO. 714/90	(19/11/90)	320
DECISION NO. 715/90	(10/12/90)	353
DECISION NO. 716/90	(19/11/90)	320
DECISION NO. 717/90	(27/11/90)	331
DECISION NO. 718/90	(18/12/90)	366
DECISION NO. 719/90I	(23/10/90)	289
DECISION NO. 720/90	(19/10/90)	288
DECISION NO. 721/90	(19/10/90)	288
DECISION NO. 722/90	(19/11/90)	320
DECISION NO. 723/90I	(21/11/90)	326
DECISION NO. 723/90	(15/04/91)	505
DECISION NO. 724/90	(13/12/90)	358
DECISION NO. 725/90	(09/10/90)	274
DECISION NO. 726/90	(28/12/90)	378
DECISION NO. 728/90	(04/03/91)	448
DECISION NO. 729/90I	(05/11/90)	304
DECISION NO. 729/90	(27/02/91)	442
DECISION NO. 730/90	(19/11/90)	320
DECISION NO. 731/90	(14/11/90)	313
DECISION NO. 732/90	(14/11/90)	313
DECISION NO. 733/90	(14/11/90)	314
DECISION NO. 736/90L	(09/04/91)	497
DECISION NO. 737/90	(19/10/90)	289
DECISION NO. 738/90*	(19/02/91) 18 WCATR 246	444
DECISION NO. 740/90I	(14/01/91)	391
DECISION NO. 742/90I	(23/10/90)	290
DECISION NO. 745/90	(23/10/90)	290
DECISION NO. 746/90	(15/10/90)	281
DECISION NO. 747/90	(31/10/90)	296
DECISION NO. 748/90	(23/10/90)	290
DECISION NO. 749/90	(13/03/91)	457
DECISION NO. 750/90	(23/10/90)	290

DECISION NO. 751/90	(23/10/90)	291
DECISION NO. 751/90R	(17/04/91)	514
DECISION NO. 752/90	(19/12/90)	370
DECISION NO. 753/90	(17/04/91)	514
DECISION NO. 754/90	(29/11/90)	337
DECISION NO. 755/90	(23/10/90)	291
DECISION NO. 756/90	(10/10/90)	276
DECISION NO. 758/90	(31/10/90)	296
DECISION NO. 759/90	(12/04/91)	503
DECISION NO. 761/90	(11/12/90)	354
DECISION NO. 762/90	(04/04/91)	490
DECISION NO. 763/90	(10/04/91)	500
DECISION NO. 766/90	(23/10/90)	292
DECISION NO. 768/90	(22/04/91)	519
DECISION NO. 769/90	(26/03/91)	474
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Volume 1

Summaries

DECISION NO. 791/89L (18/12/89) Onen Lebert Nipshagen

Leave to appeal (good reason to doubt correctness) (consideration of issue).

The Appeal Board granted entitlement for aggravation in November 1976 of a congenital hip condition but discontinued benefits in July 1977.

Although the Appeal Board found that the worker had recovered from the 1976 injury, it did this on the basis of an understanding that the worker suffered a soft tissue injury. It did not consider whether the symptoms suffered as a result of the aggravation injury had subsided.

Leave to appeal granted. [4 pages].

DECISION NO. 566/89 (18/12/89) Faubert Fox Nipshagen

Continuity (of treatment) - Jurisdiction, Board (reconsideration of Appeal Board decision).

A health care aide in a nursing home suffered compensable back strains in March 1979, July 1979 and August 1981. In June 1982, she began to experience increased pain and laid off in November 1982. The Appeal Board denied entitlement for the disability in 1982 but the Committee to Review Appeal Board Decisions revoked the Appeal Board decision and granted entitlement.

The Panel agreed with Decision No. 258/88 that the Tribunal had jurisdiction regarding the Committee's decision and that leave to appeal was not required.

The Panel accepted the worker's explanation for lack of continuity of treatment that she was concerned for her job if unable to do heavy lifting. The employer's appeal was dismissed. [9 pages].

WCAT Decisions Considered: Decision No. 32 (1986), 2 W.C.A.T.R. 1; Decision No. 258/88

DECISION NO. 477/89 (18/12/89) Stewart McCombie Jago

Consequences of injury (residual weakness) - Overuse syndrome.

A laboratory technician lacerated her left ring finger in August 1973. In 1977, she underwent surgery to her left shoulder related to the compensable accident. In 1978, she developed osteoarthritis of the right hand. The Hearings Officer denied entitlement for the right hand disability on the basis that she did not overuse her right hand after the accident.

The worker was entitled to benefits for the right hand disability. The activities of daily living, which required her to use her right hand for all functions, created a situation of consistent overuse. There was medical opinion that the osteodegenerative changes on the right side were clearly out of proportion to those on the left. [5 pages].

DECISION NO. 330/89 (18/12/89) Chapnik Fox Ronson*Suitable employment.*

An assembly line worker suffered back and arm injuries when she fell in February 1986. On the evidence, the worker continued to be partially disabled by rotator cuff tendonitis subsequent to September 1986. Two modified jobs offered by the employer were within the worker's medical restrictions and suitable. The worker was not entitled to full benefits subsequent to September 1986. [8 pages].

DECISION NO. 930/89 (18/12/89) Moore Cook Shuel*Aggravation (preexisting condition).*

The worker injured his left shoulder at work in September 1986. In January 1987, he stopped working due to shoulder pain. In February 1987, he underwent surgery to remove a pin inserted after a non-compensable shoulder dislocation in March 1984. The worker's condition did not improve after removal of the pin.

Prior to September 1986, the shoulder condition did not disable the worker. After the 1986 accident, his complaints to the employer medical department increased substantially. The Panel found that the relatively minor accident in 1986 aggravated the preexisting condition. The worker was entitled to benefits for the disability resulting from the 1986 accident. [6 pages].

DECISION NO. 826/89 (19/12/89) Stewart Fox Jewell*Temporary disability (beyond pension level).*

The worker suffered back and leg injuries in 1972 and 1982 for which he was awarded pensions totalling 25%. The worker was not entitled to temporary benefits from December 1986 to October 1987. Medical evidence supported the conclusion that the worker's condition did not worsen temporarily during this period. [4 pages]

DECISION NO. 723/89 (19/12/89) Faubert Robillard Jago*Continuing entitlement.*

The worker suffered a compensable left ankle injury when a case was thrown against her left ankle in June 1982. In September 1986, she suffered a further ankle injury when a box was pushed against her left ankle. She received benefits after the second accident until August 1987.

The worker was not entitled to benefits after August 1987. Medical evidence demonstrated that the worker had recovered from the effects of the contusion by the time benefits were terminated. There was no link between swelling or a lump on the lateral aspect of the ankle and the compensable accident in 1986. [6 pages]

DECISION NO. 723/88R (19/12/89) Chapnik Beattie Jewell

Reconsideration (consideration of evidence).

The worker applied for reconsideration of Decision No. 723/88, in which the Panel dismissed the worker's appeal from a decision denying entitlement for psychotraumatic disability subsequent to May 1986.

There were two conflicting medical opinions before the Hearings Officer. The Hearings Officer ordered a post-hearing report and, considering the evidence, denied entitlement. The Board has jurisdiction to investigate and to order medical reports. It was not required to determine the case by applying the benefit of the doubt to the two reports that were on file. The Panel could have addressed this in its original decision but it was not obliged to address each and every argument advanced by each party in its written reasons.

The worker's arguments represented his interpretation of the evidence and the weight to be attached to various factors. There was no basis for re-opening the Tribunal's decision. [6 pages]

WCAT Decisions Considered: 1248/87R, 723/88

Practice Directions Considered: Practice Direction No. 8 (1987), 1 W.C.A.T.R. 233

DECISION NO. 1008/89 (19/12/89) Starkman Fox Nipshagen

Medical examination (section 21) (medical tests).

The worker attended a medical examination requested by the employer with an orthopaedic surgeon. The orthopaedic surgeon recommended a CAT scan and a bone scan but the worker objected to these tests.

The Panel was satisfied that the employer's right to a medical examination included the right to insist that the examining doctor be able to carry out reasonable tests in the circumstances. A CAT scan and bone scan may involve some discomfort but are not life threatening or disabling. The worker was directed to undergo the CAT scan and bone scan. [4 pages]

DECISION NO. 928/89 (19/12/89) Faubert Klym Preston

Delay (onset of symptoms).

The worker suffered a compensable neck sprain in August 1982. He returned to work in February 1983. In November 1983, he laid off due to low back pain.

The worker was not entitled to benefits for the low back pain. He had a history of low back pain prior to the accident. There was a delay in onset of low back symptoms until November 1982. The Panel found that the low back pain was not related to the November 1982 accident. [7 pages]

DECISION NO. 642/89 (19/12/89) Marcotte Fox Nipshagen

Mental condition - Dizziness - Brain damage.

A tree cutter appealed a decision of the Hearings Officer denying ongoing benefits subsequent to March 1983. The worker was struck on the right side of his head by a falling tree in July 1982. The Hearings

Officer found no organic or psychological cause for ongoing complaints of head pain and dizziness.

After the Hearings Officer's decision, the worker underwent a neuropsychological assessment. The neuropsychologist found that the worker displayed severe brain impairment, that there was strong evidence for specific brain damage in an area below the region that the struck by the tree and that findings of previous doctors were based on a reluctance to undergo testing rather than upon objective findings. The Panel accepted the neuropsychologist's report and granted entitlement to continuing benefits. The appeal was allowed. [12 pages]

DECISION NO. 583/89 (19/12/89) Chapnik McCombie Ronson

Delay (claim) - Aggravation (preexisting condition) (hernia) - Hernia (inguinal).

The worker underwent surgery for bilatel inguinal herniae in November 1973. He claimed that the herniae were related to a lifting incident at work in July 1973. He did not submit a claim until 1983.

Considering the delay in seeking treatment and claiming benefits and considering inconsistencies in the worker's evidence, the Panel found that there was insufficient evidence to establish the necessary causal relationship between the employment and the development of the herniae in 1973. However, the worker was entitled to benefits on an aggravation basis for recurrences in 1974, 1975 and 1977, which were all related to heavy work. [8 pages]

Board Directives and Guidelines: Claims Adjudication Branch Procedures Manual, Document no. 33-32-07

DECISION NO. 502/89 (19/12/89) Moore Acheson Apsey

Chronic pain - Psychotraumatic disability - Leave to appeal (good reason to doubt correctness) (consideration of evidence).

The worker suffered back injuries in 1969 and 1972 for which he was awarded a 30% pension. The worker applied for leave to appeal a decision of the Appeal Board confirming the 30% pension and appealed a decision of the Hearings Officer denying benefits for chronic pain.

The Panel found that the worker was not suffering from chronic pain. The worker's pain was predominantly organic in origin, resulting from the two accidents. There was an element of post-traumatic reaction but this added little to his disability.

The Appeal Board found that the worker's condition was aggravated by non-compensable emotional factors. Even if the Appeal Board erred in finding that the emotional factors were not compensable, the Panel found that the 30% pension was appropriate for the disability, including the psychological symptoms.

The appeal was dismissed. Leave to appeal was denied. [7 pages]

DECISION NO. 1027/89I (19/12/89) Kenny Cook Apsey

Three week rule - Adjournment (admission of evidence).

The worker appealed a decision regarding the earnings basis for calculation of benefits. Less than three weeks before the hearing, the employer submitted documents and notified the Tribunal of witnesses to support its position that the worker was not a management trainee. Previously, this had not been disputed by the employer.

The Panel admitted the materials since it was relevant to the issue to be decided. The Panel also granted adjournment since the nature of the case had changed. [4 pages]

DECISION NO. 892/88 (19/12/89) McGrath Fox Guillemette

Commutation (debt liquidation) (home mortgage) - Commutation (social rehabilitation) - Jurisdiction, Tribunal (leave to appeal).

The worker was granted a 25% pension in 1985. The worker's request for a full commutation for the purpose of a mortgage reduction was dismissed by the Appeal Board in 1978. In 1987 the worker again requested a commutation for mortgage reduction. The matter was heard anew, despite the existence of the Appeal Board decision, because of the drastic change in the worker's circumstances. The Hearings Officer denied the request and the worker appealed.

The Panel considered Decision No. 258/88 and concluded that this matter was to be heard as an appeal as of right from the Hearings Officer's decision pursuant to s.86g of the Act. Leave to appeal the Appeal Board decision pursuant to s.86o(3) was not necessary.

As the worker was employed on a full-time basis, a commutation would serve no rehabilitative purpose from an employment perspective.

The worker had been a poor money manager since before the compensable accident. His mortgage debt had increased from \$24,000 in 1977 to \$58,000 in 1988. His untenable financial situation had led to a distressing marital situation. The worker was uncertain and confused as to what he would really use the commutation funds for. The Panel thus concluded that a commutation would neither have a socially rehabilitative effect, nor would it be in the worker's long-term best interests. Given his poor track record for money management, the security of a monthly income would be in the worker's best interests. Appeal dismissed. [8 pages]

WCAT Decisions Considered: Decision No. 235/88 (1988), 8 W.C.A.T.R. 347; Decision Nos. 406/87, 258/88
Board Directives and Guidelines: Policy, Commutation of Pensions, Board Minute #4, April 3, 1987, p. 5186

DECISION NO. 183/89 (19/12/89) Moore Lebert Seguin

Delay (treatment) - Parties (participation) (adequacy).

The employer appealed the Hearings Officer's granting of benefits for a back condition which resulted from the worker's fall from a bulldozer in May 1983.

The worker did not complain to a doctor of his back and right leg problem until August 1984. There was, however, substantial testimony of changes in the worker's home and work activities since the summer of 1983. Although the May 1983 accident might have been minor, its effect on the worker was significant and reasonably immediate. The 1983 accident contributed either to the aggravation of non-symptomatic preexisting degenerative disc disease in the worker's spine, or to the direct development of such changes, leading to symptoms of nerve root compression. The appeal was dismissed.

The Panel noted that the employer had very actively pursued its appeal, prompting the worker to prepare a meticulous response and to subpoena a number of witnesses. The expense of the subpoenas and of taking a panel to Sudbury for the hearing was borne collectively by the province's employers. However, at the hearing of the appeal, the Panel was left with a clear impression of profound disinterest in the appeal on the part of the employer. This represented a lack of respect for the Tribunal and a substantial disservice to the worker and to all other employers. [7 pages]

DECISION NO. 641/88 (20/12/89) Marcotte McCombie Apsey

Supplements, temporary - Rehabilitation (cooperation).

The worker suffered compensable injuries for which he was awarded a pension in March 1983. The Hearings Officer denied a temporary supplement from March 1983 to December 1985.

The Panel found that the worker was entitled to a supplement. His impairment of earning capacity was three times the usual for nature of the injury and, thus, was significantly greater than usual. He cooperated with medical and vocational rehabilitation. [12 pages]

DECISION NO. 1024/89 (20/12/89) Onen McCombie Meslin

Medical opinion (heart attack) (respiratory disease) - Smoking - Heart attack.

The worker's widow appealed the denial of dependency benefits. The worker was a miner who for 30 years spent most of his time doing underground drilling and blasting. The worker died of a heart attack, but an autopsy also revealed that he suffered from emphysema and longstanding lung disease.

Though there was an established disease process in the worker's lungs prior to the heart attack, it was not disabling. Nevertheless, if the worker's lung complaints resulted from his employment and they contributed to his heart attack, entitlement to compensation would flow from the heart attack.

The medical evidence was unanimous that the lung condition was more compatible with smoking than with exposure in mines. The worker's employment as a miner was not a significant contributing factor to his lung condition. In any event, the lung condition was not a significant contributing factor to his heart attack. The evidence was that respiratory disease can cause right heart strain (cor pulmonale). In this instance, it was clearly the left side of the heart that was involved. Appeal dismissed. [7 pages]

DECISION NO. 782/89 (21/12/89) Hartman Robillard Apsey

Accident (occurrence) - Delay (treatment) - Credibility.

The worker claimed he suffered a back injury on August 4, 1986, when a hook struck him on the back. There was a delay in seeking treatment and reporting the injury, although not a long delay. The Panel could not accept the explanation for delay that the worker was concerned for his job, since the worker had a four-day lay-off immediately after the accident, during which he could have sought treatment privately. The worker's evidence was not sufficiently credible to overcome negative inferences from his failure to report and seek treatment. [8 pages]

WCAT Decisions Considered: 25, 232

DECISION NO. 821/89 (21/12/89) Marafioti Heard Preston

Delay (onset of symptoms).

The worker slipped in 1979, striking his mouth against a machine. He received benefits for about one week. The worker was not entitled to benefits for a neck condition or headaches in 1987. There was no

indication that the worker suffered a neck injury in the accident. The worker's condition was due to degenerative cervical disc disease. The accident was not a significant contributing factor to the worker's condition. [5 pages]

DECISION NO. 929/89 (21/12/89) Stewart Heard Seguin

Subsequent incidents (outside work).

The worker suffered a low back strain in June 1987, for which he was off work for two weeks. In April 1988, he suffered an onset of low back pain at home.

The worker was entitled to benefits for the onset of pain in 1988. The worker did not have back problems prior to the 1987 accident and x-rays indicated no preexisting condition. The Panel accepted that the worker had ongoing back problems since the accident. [4 pages]

DECISION NO. 737/89 (21/12/89) Marafioti Nipshagen Cook

Suitable employment - Rehabilitation, vocational (cooperation).

The worker suffered a compensable lumbosacral strain. He returned to modified work in June 1987. The work consisted of picking up litter with a stick that had a nail on the end. The worker was instructed by the employer that he could work at his own pace, taking breaks as required. In July 1987, the worker had to lay off work due to worsening back problems caused by the fact that he had to walk on rough terrain involving small ditches and inclines. In November 1987, the worker returned to the same work, but with the further modification that he was not required to walk on rough terrain. The worker has been employed at this job since then, without further complications.

The worker's disability between July 1987 and November 1987 was an aggravation of the original compensable accident because the work was not sufficiently modified. During this period the worker was only partially disabled. To be entitled to 100% benefits, the worker should have shown greater initiative in assisting the vocational rehabilitation plan established for him. All that was required for the worker to make the job suitable was to have communicated to his employer that he would no longer go into rough terrain as that aspect of the job caused him problems. As the worker's lack of motivation caused the communication breakdown, the worker was only entitled to 50% benefits.

On a preliminary matter, the Panel permitted the introduction into evidence of a videotape which illustrated the terrain travelled by the worker. Both parties and the Panel agreed that viewing the videotape would be useful before proceeding with oral testimony. [6 pages]

DECISION NO. 932/88 (21/12/89) Strachan Higson Meslin

Pensions (assessment) (fingers, middle finger) - Supplements, temporary (rehabilitative purpose).

The worker, a crane operator who had cut his right hand between the first two fingers, appealed the level of his 2% pension award and sought entitlement to a temporary supplement.

The 2% award was based on the immobility of the worker's right middle finger. The worker continued to suffer pain and swelling. Some doctors offered a diagnosis of septic arthritis and osteomyelitis and suggested an arthrodesis (fusion operation) of the finger. Other doctors did not appear to endorse this

procedure. The Board's last assessment took place in April 1984. The Panel found that the level of disability now exceeded 2% and, taking into account the whole hand function, may have exceeded 2% in November 1984. The matter was referred back to the Board for a further assessment.

The worker was now aged 67. The accident occurred in 1979 and the hand condition had continued to deteriorate since then. Rehabilitation services were extended to the worker in 1982, 1983 and 1984 but were of no assistance in returning the worker to employment. There was no reason to expect that further efforts would have such an effect. Therefore, even if the worker met the other requirements for entitlement to a supplement, the Panel should not interfere with the exercise of the Board's discretion not to pay the supplement in this case. [9 pages]

WCAT Decisions Considered: Decision No. 915 (1987), 7 W.C.A.T.R. 1; Decision No. 124/88 (1988), 9 W.C.A.T.R. 231; Decision No. 212/88 (1988), 9 W.C.A.T.R. 248; Decision No. 349/88

DECISION NO. 842/89 (21/12/89) Marcotte Robillard Nipshagen

Disablement (awkward position).

The worker suffered a lumbosacral strain in September 1976. The presence of degenerative disc disease was confirmed shortly thereafter. The worker received benefits from September to October 1976 and from January to March 1977. In November 1982, while working as a bricklayer, the worker experienced renewed low back pain. The Tribunal found, in Decision No. 173/87, that there was no relationship between the 1976 accident and the 1982 lay-off. The worker now claimed for benefits on the basis that he suffered a disablement arising out of his employment on November 17, 1982.

The worker's job activities on November 17, 1982, which consisted of applying and tamping a putty-like substance to the walls of a kiln, were not those he usually performed as a bricklayer. He was required to assume an awkward position, given the sloping curve of the wall which prevented him from kneeling while working at the lower levels of the kiln wall.

The worker's degenerative disc condition was asymptomatic between March 1977 and November 1982, except for a five to six week period following a non-compensable injury in 1980. The pain caused by the underlying condition did not prevent the worker from performing his regular work duties even though the condition had deteriorated between 1977 and November 1982. The worker was entitled to benefits for the compensable accident by way of disablement suffered on November 17, 1982. [11 pages]

WCAT Decisions Considered: 173/87

Board Directives and Guidelines: Claims Services Division Manual, s.1(1)(a), p.1, Directive 2

DECISION NO. 963/88 (21/12/89) Faubert Heard Nipshagen

Supplements, temporary - Rehabilitation, vocational (training) - Rehabilitation, vocational (cooperation) - Availability for employment (trip outside Ontario) - Significantly greater than is usual.

The worker, a 22 year old automobile assembly worker, injured his shoulder in 1978. He had the equivalent of a grade 11 education and had worked with the accident employer for two years at the time of the accident. His restrictions included no overhead work, the avoidance of the use of his right arm against moderate or heavy resistance, and the avoidance of extension and rotation of the neck. Considering these factors, the worker's impairment of earning capacity was significantly greater than usual.

The worker sought supplementary benefits for the period from January to July 1983. On two prior occasions, the worker had failed to carry through with courses sponsored by the Board. The Panel determined that it must consider not only the worker's prior rehabilitation history but also his actions during the material time, when deciding the degree of his co-operation.

The worker had contacted the Board in December 1982 to request additional rehabilitation assistance. It was evident that he had already formed an intention to visit his ailing father. As he had made specific arrangements to be out of the country from February 7 to March 6, 1983, he was not available for employment or for rehabilitation for the period from January to March 6, 1983 and thus was not entitled to a supplement for that period.

The worker's conduct after his return to Canada in March 1983 demonstrated a sincere desire to co-operate with rehabilitation. He underwent the required testing which demonstrated acceptable performance and a change in motivation. In July 1983, the worker underwent six weeks of vocational assessment and then completed a two-year community college business course. The worker was entitled to a supplement from March 6 to July 1983. [9 pages]

WCAT Decisions Considered: Decision No. 212/88 (1988), 9 W.C.A.T.R. 248; Decision Nos. 1074/87, 539/89

DECISION NO. 867/88 (22/12/89) Bradbury Cook Meslin

Pensions (arrears).

The worker suffered an injury in 1973 that rendered symptomatic his underlying degenerative disc condition. The worker was granted a pension which was assessed originally at 5%. On appeal, the amount of the pension was increased to 10% and in 1984 to 15%. The Board determined that arrears of the 10% pension should be paid back to 1978, the date the worker's family doctor wrote to the Board requesting that the worker's file be re-opened due to his continuing pain, but that the 15% pension should be paid only from July 1984. The worker sought full arrears back to the date of the accident.

There was no change in the worker's condition in 1978. It had remained the same from 1973. The worker was entitled to arrears of the 10% pension back to 1973.

In 1982 the worker was hospitalized due to a severe attack of back and leg pain. He was unable to return to work and had to discontinue or reduce the level of other activities. The worker was entitled to the increase in pension to the 15% level, effective from 1982. [5 pages]

DECISION NO. 739/89 (22/12/89) Kenny Robillard Meslin

Penisons (assessment) (mental condition) - Maximal medical rehabilitation - Chronic pain.

The Hearings Officer granted the worker a 50% pension, including 25% for aggravation and magnification of the residual organic disabilities by the worker's underlying psychological condition. The Hearings Officer also denied entitlement for chronic pain and granted temporary benefits from November 1987 to June 1988.

In view of the pension for increased disability from the combination of organic and non-organic factors, it was not appropriate to make an additional award for chronic pain.

However, the worker suffered from psychological problems which more than magnified the physical problems. In 1988, psychiatrists diagnosed anxiety neurosis, depressive disorder and even psychosis. In addition, it appeared that the organic disability may have worsened.

The worker had not achieved maximal medical rehabilitation by June 1988. He was undergoing psychiatric treatment and there were also concerns about his drug intake. The worker was entitled to full temporary benefits from June 1988 until he reaches maximal medical rehabilitation. At that time his pension may be reassessed or he may be entitled to a supplement. [10 pages]

WCAT Decisions Considered: Decision No. 915 (1987), 7 W.C.A.T.R. 1

DECISION NO. 922/88 (22/12/89) Marcotte Heard Jago

Medical report (post-hearing) - Continuity (complaint).

The worker strained his back in a compensable accident of June 1969 but he returned to work six days later. He claimed for a back disability subsequent to September 1981, at which time he underwent surgery that revealed segmental instability with facet joint subluxation and arthritic changes. In 1969 x-rays revealed no disc narrowing, in 1975 there was moderate narrowing and in 1981 there was marked narrowing.

Medical reports, including one requested by the Panel after the hearing, stated that there was no significant evidence to establish a causal relationship between the 1969 accident and the 1981 condition. However, the Panel's review of these reports disclosed that neither of them stated that the worker's 1981 condition was inconsistent with the injuries sustained in 1969. Rather, both reports emphasized the lack of continuity of complaint by the worker.

Shortly after returning to work in 1969 the worker switched to a less demanding job. In 1972 he changed to a job which did not require heavy lifting. From 1970 to 1975 the worker received chiropractic treatment. From April 1976 to January 1981, the worker received no medical or chiropractic treatment because neither had assisted him and he had learned to live with the pain. In January 1981 the worker's condition worsened and he resumed medical treatment. The Panel thus found that there was sufficient evidence of continuity to establish a causal relationship between the 1969 accident and the 1981 condition. [19 pages]

Appendices: Medical opinion as to the cause of segmental instability, facet joint subluxation and arthritic changes in the spine.

DECISION NO. 590/89 (22/12/89) Hartman Klym Jago

Worker (test) (hybrid test) - Independent operator (newspaper distributor).

The claimant for compensation benefits appealed a decision which found that he was not a worker under the Act and therefore was not entitled to benefits. The claimant was a motor route driver for a newspaper business. He picked up newspapers at press time and delivered them to various locations.

The Panel's review of the Tribunal case law led it to conclude that panels apply a hybrid test incorporating aspects of both the "control test" and "organization test". Examining the facts using both tests ensures a balanced perspective when determining status under the Act. The Panel had to look only at the relationship between this particular claimant and the newspaper. The employer could have independent operators working alongside workers and yet call both motor route drivers.

The relationship of the newspaper's circulation manager to the claimant was that of employer/supervisor. The claimant was told how to perform his deliveries and was criticized for his grooming habits and driving behaviour on the basis that he was representing the company. There was significant control retained by the company in its choosing of recruits, its design of the routes to provide less than a full-time income and its pre-setting routes by the order of the press run.

When the claimant became a motor route driver, there was no scope for negotiation or variation of the terms of the contract. The claimant felt that his services could be terminated at any time if it pleased the newspaper. The claimant's agreement to provide a car at his own expense was the only even remotely entrepreneurial aspect of his role. The claimant was an integral part of the newspaper's regular business and was not in business for himself independent of the newspaper.

The appeal was allowed. [12 pages]

WCAT Decisions Considered: Decision No. 154 (1986), 1 W.C.A.T.R. 208; Decision No. 503/871 (1988), 8 W.C.A.T.R. 156; Decision No. 576/87 (1987), 6 W.C.A.T.R. 163; Decision No. 1067/87 (1988), 8 W.C.A.T.R. 253; Decision No. 432/88 (1988), 10 W.C.A.T.R. 216; Decision No. 701/871

Other Statutes Considered: Labour Relations Act, R.S.O. 1980, c.228

Cases Considered: Ottawa Newspaper Guild, Local 205 of the Newspaper Guild v. The Citizen, a division of Southam Inc., (O.L.R.B.), 1985 O.L.R.B. Rep. June 819

DECISION NO. 968/89 (22/12/89) Carlan Fox Preston

Pensions (assessment) (fingers) (little finger) - Pensions (assessment) (metacarpal).

The worker appealed the level of his pension. As a result of a crushing injury, the worker was left without a small finger. He also lost part of the corresponding metacarpal, the bone in the palm of the hand which connected to the small finger. The worker had been granted a 2% award for the finger and 0.5% for the metacarpal.

The worker returned to his job as a tool and die maker without loss of pay. He experienced a pulling sensation in the hand, additional sensitivity and minimal nerve conduction loss, but none of this affected his ability to function. There was thus no basis for additional compensation beyond the levels provided for in the Rating Schedule. However, the Rating Schedule recognizes a 1% award for the metacarpal, without reference to reductions. The worker was thus entitled to an additional 0.5% award for the metacarpal, bringing his total pension to 3%. [5 pages]

DECISION NO. 669/89 (22/12/89) Hartman Klym Preston

McBride v. Moreira

In the course of employment (travelling) - In the course of employment (lunch) - In the course of employment (personal activity) - In the course of employment (distinct departure test).

The worker arranged with his employer to combine his two paid 15 minute breaks with his unpaid 30 minute lunch, so that he would have 60 consecutive minutes during which he could eat lunch and do personal banking. The worker then agreed, as a favour to the employer, to certify a customer's cheque at another bank located in the same mall as the worker's bank. After lunch, the worker was to proceed directly to a customer's home to perform a service call. Performing service calls formed part of the worker's regular duties, but certifying cheques did not.

The worker testified that when he had eaten and finished all the banking, he still had a lot of time left on the lunch hour so he decided to visit a friend. On the way, the worker was involved in a motor vehicle accident. After dealing with the required formalities at the accident scene, the worker went directly to the customer's home.

The Panel found that the worker was at the mall for primarily personal reasons - eating and banking. Certification of the employer's cheque was an incidental employment-related task that was already completed at the time of the accident. However, his next employment-related task was travelling to the service call.

Even if on leaving the mall the worker intended to first visit a friend, that did not create a distinct departure from the route to the service call site. All routes that the worker surmised he might have taken were logical routes to take to the site of the service call. His personal intentions did not take him out of the employment-related risk of travelling to the service call.

Nothing in the worker's personal stop-over plans or routes followed took him out of the course of employment. The worker's right of action against the other driver was taken away. [9 pages]

WCAT Decisions Considered: Decision No. 420 (1986), 3 W.C.A.T.R. 168; Decision Nos. 321, 817/87, 174/88, 571/88

DECISION NO. 998/88 (27/12/89) Bigras Robillard Meslin

Apportionment - Negligence - Investigation by Tribunal (inspection) - Three week rule.

The worker was injured when he was struck by a falling angle iron. At the time, a contractor's employees were performing work at the employer's premises immediately above the worker. The contractor appealed a decision of the Hearings Officer transferring the costs of the accident to its account.

In a preliminary matter, the Panel admitted photographs of the workplace and evidence from two witnesses that did not comply with the three week rule, due to the value of the evidence.

On the evidence, including inspection of the premises by the Panel, the Panel found that it was unlikely that the contractor's employees installed any angle iron that day. Angle iron previously installed by the contractor could not have fallen and hit the worker. It was likely that loose angle iron not installed by the contractor fell and hit the worker. The appeal was allowed. [12 pages]

WCAT Decisions Considered: 586/89

DECISION NO. 796/89L (27/12/89) Chapnik Higson Jago

Leave to appeal (substantial new evidence) (medical literature).

The worker sought leave to appeal an Appeal Board decision which granted him benefits for frost bite only from February 13 to 18, 1965. He referred to several articles written about frost bite injuries which it was submitted were new evidence unavailable at the time of the hearing.

The denial of further benefits was based on the medical evidence that there were no signs of frost bite after February 18, 1965. In fact the worker's physician questioned whether there had been a genuine frost bite at any time as there were no skin changes, blisters, change of colour, loss of skin or other signs of frost bite. The Appeal Board's determination that no treatment was obtained or findings were made of frost bite after February 18 was a question of fact, not law, on which no new evidence was provided.

Leave to appeal was denied. [6 pages]

DECISION NO. 673/89 (27/12/89) Bigras Drennan Meslin

Second accident - Intervening causes - Worker (status during job search) - Rehabilitation, vocational (job search).

The worker suffered an injury when she fell while on the premises of a prospective employer. At that time, she was conducting a job search in order to maintain entitlement to the temporary supplement being paid

to her by the Board. The Board denied benefits on the basis that she was not a "worker" under the Act at the time of the fall and because the injury sustained did not result from the worker's compensable disability.

The worker's fall was not a separate accident arising out of and in the course of employment. She thus did not qualify for benefits directly under s.3(1). However, if the second accident was a sequela of the compensable injury, the worker would remain a worker for all purposes related to the compensable injury. The worker would be entitled to compensation if it were to be shown that the compensable injury was a significant contributing factor to the second accident and if there were no intervening factor breaking the chain of causation between the compensable injury and the second accident.

The worker's compensable injury was a significant contributing factor to the second accident. The worker would not have been looking for work and thus would not have been exposed to the conditions that caused the second accident but for the compensable injury. The worker's activity at the time of the second accident was related to her compensable injury because she would have been disqualified from receiving a supplement if she did not cooperate by performing a job search as part of her rehabilitation program.

The second accident was not an intervening factor breaking the chain of causation between the worker's compensable accident and her disability subsequent to the second accident. It was not reasonable in this case to require a medical connection, as the worker was not arguing that her existing compensable condition caused the fall which resulted in further injury. In this case the fall was not related to the compensable injury, but rather to the requirement to look for work. The job search was the final phase of the worker's rehabilitation program. It would be unfair to deny entitlement during this phase, when compensation would have been payable for accidents occurring during the prior training phases.

This case was distinguishable from instances where the worker was in the course of travelling to or from a prospective employer's premises at the time of the accident. The worker was actually on the prospective employer's premises when she fell.

The worker was entitled to temporary total benefits for the period of disability subsequent to the second accident. [14 pages]

WCAT Decisions Considered: Decision No. 915 (1987), 7 W.C.A.T.R. 1; Decision No. 79/87 (1987), 6 W.C.A.T.R. 104; Decision Nos. 176, 357/87, 692/87, 1023/87

Board Directives and Guidelines: Claims Adjudication Branch Procedures Manual, Document no. 33-27-04

DECISION NO. 707/89 (27/12/89) Chapnik Drennan Apsey

Pensions (assessment) (fingers) (fourth and fifth fingers).

The worker appealed the 3% pension awarded for his right hand disability caused by tendonitis due to operation of an air gun. Four surgical procedures failed to correct the worker's problems but he was able to return to full-time modified work that did not involve the use of vibrating tools or heavy gripping with his right hand.

Examination of the worker's hand revealed: reduced grip, two large surgical scars, tenderness in the fourth and fifth fingers, hyposensitivity, and an area of marked hyperesthesia. However, no muscle wasting was observed and movement and strength of the right wrist and forearm were full. The symptoms found by Board doctors were consistent with those found by the worker's own doctor, only the rating of the extent of the disability varied.

The worker's doctor was unfamiliar with the Rating Schedule. The worker's injury did not appear in the Rating Schedule, but the Board properly used the schedule's 7.5% rating for amputation of both the fourth and fifth fingers at the metacarpal as a "benchmark". The 3% award correctly measured the worker's residual disability. [6 pages]

WCAT Decisions Considered: Decision No. 915 (1987), 7 W.C.A.T.R. 1

DECISION NO. 713/89 (27/12/89) Onen Beattie Meslin

Significant contribution (of compensable accident to development of condition) - Psychotraumatic disability - Chronic pain - Issue setting - Jurisdiction, Tribunal (leave to appeal).

The worker suffered a minor back strain in May 1978 and she received benefits from June to August 1978. The Appeals Adjudicator ruled that the worker was not entitled to further benefits since she did not continue to suffer from any organic disability and there was no psychogenic or psychological disability which resulted from the accident. The Appeal Board confirmed the Adjudicator's decision. The worker appealed to the Tribunal for ongoing entitlement on the basis of psychotraumatic disability.

The Panel decided that leave to appeal the Appeal Board's decision was not required since the Appeal Board did not consider the issue of psychotraumatic entitlement, that issue having been withdrawn at the instance of the worker. On another preliminary matter, the Panel decided that the issue as to whether the worker suffered from chronic pain should be included on this appeal. The evidence relating to the presence of chronic pain was so intertwined with the evidence addressing the question of entitlement for any psychological condition, that it was more reasonable to consider these issues together.

Ultimately, the Panel determined that the question to be addressed was entitlement for any non-organic disability, whether psychiatric or psychogenic pain. The worker's disability manifested itself as pain and it was not necessary to determine the most appropriate label. The May 1978 accident undoubtedly triggered a disease process which progressed from a minor strain to a pain disability that prevented the worker from working by February 1979. The question was the extent to which the triggering event, the accident, was responsible for the development of the process which manifested itself as disabling pain.

Given the minor nature of the accident, the worker's ability to continue working after the accident, the minimal treatment and the very gradual development of symptoms which eventually became disabling, the accident was not a significant cause of the disability. The medical evidence indicated that the worker's family dynamics played a major role and the worker's own personality was likely a causative factor. The trigger provided by the accident was not a significant contributing factor to the development of the worker's psychiatric or chronic pain disability. Appeal dismissed. [14 pages]

DECISION NO. 776/89L (28/12/89) Stewart Beattie Meslin

Leave to appeal (good reason to doubt correctness) (natural justice) - Natural justice (disclosure of evidence) - Natural justice (opportunity to make submissions).

The worker sought leave to appeal an Appeal Board decision which denied him benefits for a low back disability.

When the worker applied for the Appeal Board to reconsider its decision, the Appeal Board realized that it had failed to obtain the opinion of a Board surgical consultant before making the initial decision. The Appeal Board obtained the consultant's report, which stated that there was no relationship between the work accident and the worker's disability. Without referring to this report, the Appeal Board dismissed the application for reconsideration.

The worker was never provided with a copy of the consultant's report or with an opportunity to make submissions on it. This constituted a breach of natural justice. Having solicited and obtained the report, it was unlikely that the Appeal Board would ignore it when deciding the reconsideration request. By obtaining the information that it recognized it should have had with respect to the issue on appeal, the Appeal Board engaged in a reassessment of the merits of the appeal, rather than merely considering whether there existed a sufficient basis for reconsidering its original decision. The defect in natural justice thus gave good reason to doubt the correctness of the Appeal Board decision. [5 pages]

DECISION NO. 631/89 (28/12/89) Stewart Cook Meslin

Preexisting condition (slipped femoral epiphysis) - Osteoarthritis.

The worker claimed benefits for a low back and hip disability. In April 1977 he suffered an acute lumbosacral strain and returned to work in September 1977. He laid off work because of the pain in 1983. Examination in 1984 revealed extensive degenerative osteoarthritic changes in the pelvis and hips and there was evidence suggesting an old femoral epiphysiylolysis. A total hip replacement was performed. With respect to the lumbar spine, there was a slight scoliosis and early degenerative changes were noted in the discs and apophyseal joints.

There was no relationship between the compensable accident and the worker's osteoarthritic hip condition, which most likely resulted from a preexisting slipped femoral epiphysis. The stiffness in the hip could aggravate the worker's low back due to the necessity of exaggerating certain movements of the back in order to protect the hip. This could also explain the worker's ongoing back problems. The worker was not entitled to benefits. [8 pages]

DECISION NO. 700/89 (02/01/90) Chapnik Beattie Jago

Rehabilitation, vocational (cooperation) - Availability for employment (job search) - Temporary partial disability (wage loss benefits).

The worker suffered a low back injury in January 1982. He received 50% partial disability benefits for periods subsequent to May 1983. He was awarded a pension and a supplement in November 1984.

From May 1983 to August 1983, the worker was not conducting an active job search. He was not entitled to full benefits. In December 1983, he started a pizza business with a partner. From December 1983 to March 1984, he was not actively seeking employment but he was doing some work in the business and was, therefore, entitled to full benefits. From March 1984 to August 1984, the worker was not entitled to full benefits since he did not work in the business and did not make a genuine effort to find alternative work.

The worker was not entitled to a wage loss benefits from August 1984 to November 1984. He received a wage loss supplement to his pension for one and one-half years subsequent to November 1984. Board policy stipulates that supplements are awarded for temporary periods usually not exceeding 12 months. The Board was correct in exercising its discretion to refuse wage loss benefits for the period prior to November 1984 pursuant to s.40(2)(a). [10 pages]

WCAT Decisions Considered: Decision No. 59 (1987), 5 W.C.A.T.R. 17, Decision No. 137 (1987), 4 W.C.A.T.R. 87, Decision No. 915 (1987), 7 W.C.A.T.R. 1

DECISION NO. 875/89 (02/01/90) Faubert Jackson Nipshagen

Access to worker file, s.77.

The worker suffered a compensable shoulder injury in September 1987. The employer, who requested SIEF relief and disputed payment of continuing benefits beyond 30 days, sought access to the worker's file. The worker only objected to the release of documents pertaining to his treatment at a behavioural health clinic and of information concerning surgery that he underwent in April 1988.

It would be important for the employer to learn whether the surgery was related to the worker's claim or affected the level of his disability. The documents relating to the surgery should thus be released.

Information, in the reports from the behavioural clinic and in the Board's letter of referral to the clinic, was relevant to the issues of continued payment of benefits and to the possibility that psychological factors prolonged the disability. It did not appear that this information was so prejudicial that it should not be released notwithstanding its relevance. [4 pages]

DECISION NO. 606/88R (02/01/90) Onen Lebert Apsey

Reconsideration (change in fact) - Procedure (reconsideration) (new application).

The worker applied for reconsideration of a decision which denied his request for the commutation of his pension. At the time of the injury, the worker was a veterinary technician who also operated a dairy farm. The worker was unable to continue working at his regular job, nor could he do the heavy labour required on the farm. Debts were thus incurred in the operation of the farm and the commutation was originally requested for the payment of those debts so as to save the farm.

The worker presented new information as to his current circumstances. He stated that he had found suitable employment, sold the farm, purchased a house and purchased two automobiles. The worker claimed this new set of circumstances had placed him in financial difficulty.

The facts in question were almost entirely different at the time of the reconsideration than they were when the original appeal was heard. There was consequently no reasonable basis for a reconsideration of the original decision. This was essentially a new application. The application for reconsideration was therefore dismissed, but it was referred to the Board to be considered as a new application for commutation. [4 pages]

WCAT Decisions Considered: 606/88

DECISION NO. 863/89 (02/01/90) Marafioti Robillard Meslin

Subsequent incidents (outside work) - Consequences of injury (residual weakness).

The worker was not entitled to benefits subsequent to November 8, 1984 for a low back disability which he claimed related to a compensable accident of August 1984.

The medical evidence established that the worker's back problems relative to the August accident were resolved by November 7, 1984. The only continuing treatment at the time was chiropractic treatment which was about to be discontinued. The worker had already returned to his regular job for a lengthy period prior to the new onset of pain. The worker's non-work-related falls on November 8, 1984 and in January 1985 therefore were not causally related to the August 1984 accident. [7 pages]

Board Directives and Guidelines: Claims Adjudication Branch Procedures Manual, Document no. 33-02-20; 33-27-02

DECISION NO. 970/89 (03/01/90) Carlan Fox Preston

Disability (disabled from working).

The worker fell off a company bicycle in July 1986, hitting his knee. He did not lay off until one month later.

The Panel found it was unlikely that the worker was disabled as a result of leg problems during his lay-offs in 1986 and 1987. He fell off the bike and hurt his leg but was able to continue working. He did not lay off until non-compensable hypertension started to cause a significant problem. [5 pages]

DECISION NO. 969/89 (03/01/90) Carlan Fox Preston

Continuing entitlement - Maximal medical rehabilitation.

The worker suffered tendonitis from repetitive work in 1984. The Board denied benefits subsequent to June 1986.

By June 1986, doctors were no longer prescribing any treatment and her condition reached a plateau. The worker was not entitled to temporary benefits after June 1986. There was sufficient medical evidence that the worker continued to experience residual disability related to the compensable accident. The Panel recommended that the Board assess the worker for a pension. [6 pages]

DECISION NO. 1006/89 (04/01/90) Strachan Cook Preston

Access to worker file, s.77.

Access to the worker file was granted to the employer. [3 pages]

DECISION NO. 1005/89 (04/01/90) Strachan Cook Preston

Access to worker file, s.77 (non-medical information).

Access to the worker file was granted to the employer. Reports regarding the worker's non-compensable condition were relevant to the issue of SIEF.

The Panel noted that the Board previously had released various WCB memos to the employer. Some of these memos contained references to the worker's medical condition, including the non-compensable condition. It appeared to the Panel that, to comply with s.77(5), the Board should expunge from any material initially released to the employer, those parts of any memos which quote or summarize medical reports contained in the worker's file. [4 pages]

DECISION NO. 981/89L (04/01/90) Kenny Klym Preston

Leave to appeal (good reason to doubt correctness) (evidence to support Appeal Board conclusion).

The Appeal Board denied entitlement for paroxysmal nocturnal hemoglobinuria. This is a rare condition existing from birth, which can be made symptomatic by an external event, such as exposure to benzene. The worker claimed that he was exposed to benzene in a soaking pit area, which contained coke oven gas.

There was sufficient evidence to support the Appeal Board conclusion that the worker was not exposed to significant levels of benzene. Leave to appeal denied. [6 pages]

WCAT Decisions Considered: Decision No. 64 (1986), 2 W.C.A.T.R. 19; Decision No. 131 (1986), 2 W.C.A.T.R.77

DECISION NO. 1029/89 (04/01/90) Starkman Fox Jago*Hearing loss - Presbycusis.*

A 75 year old worker appealed a decision of the Hearings Officer denying further benefits for hearing loss. The worker retired in 1976. The Board awarded a 2.4% pension for hearing loss.

Audiograms in 1983 showed a deterioration in hearing. It was not probable that noise exposure at work would continue to affect the worker's hearing six years after leaving the exposure. The appeal was dismissed. [5 pages]

DECISION NO. 978/89 (04/01/90) Strachan Fox Preston*Delay (onset of symptoms) - Disability (disabled from working).*

The worker slipped and fell, striking his head, in June 1977. He did not lose any time from work. In 1981, he began to complain of neck problems. In 1983, he suffered a compensable low back injury. The Hearings Officer denied entitlement for the neck disability.

The worker was not entitled to benefits for the neck condition. There was a delay in onset of symptoms until 1981. The worker was able to perform his regular duties until the accident in 1983. Any aggravation of cervical disc disease by the 1977 accident was not sufficient to be disabling. [7 pages]

DECISION NO. 866/89 (05/01/90) Hartman Robillard Seguin*Access to worker file, s.77.*

Access to the worker's file was granted to the employer.

The worker requested that, if access were granted, certain references in a report should be deleted. With respect to certain reports, particularly patient histories, it is often difficult to determine what is conceivably relevant and is unquestionably irrelevant. In this case, the Panel found that the entire report should be released. [3 pages]

DECISION NO. 1019/89 (05/01/90) Carlan Acheson Shuel*Temporary total disability.*

The Board reduced the worker's benefits to 50% after she was discharged from HRC to modified work. However, there were opinions from a social worker, the family doctor and a visiting registered nurse that the worker was not capable of modified employment. The Panel found that the worker was entitled to temporary total benefits during the period in question. [4 pages]

DECISION NO. 993/89 (05/01/90) Onen Fox Ronson*Suitable employment - Continuing entitlement - Issue setting.*

The worker suffered a low back injury in October 1984. He returned to modified work in June 1987 but laid off in July 1987. He returned again to the same work in September 1987 and worked until December 1987,

when he suffered a non-compensable fall. He also suffered from non-compensable depression in April 1988 and had another non-compensable fall in May 1988.

The worker was not entitled to benefits for the lay-off from July to September 1987. On the evidence, the modified work on an auto assembly line, placing side panels in the trunk and connecting thermostat hoses, was suitable and within the worker's medical restrictions.

The worker was not entitled to benefits for the lay-off from December 1987 to August 1988. The lay-off was caused by the non-compensable conditions.

The Panel had jurisdiction but did not consider entitlement subsequent to August 1988. There was a serious absence of relevant evidence. While it could instruct Tribunal counsel to obtain missing evidence, the Panel felt that, in this case, the necessary investigation was so extensive that it would more appropriately be carried out by the Board at first instance. It would be difficult from a practical point of view to essentially create the entire record for a substantial portion of the appeal at the conclusion of the oral hearing. [10 pages]

DECISION NO. 683/89 (05/01/90) Kenny Cook Apsey

Delay (reporting injury).

A waitress claimed entitlement for a back disability, which she claimed was related to a fall at work in 1980. The worker did not report the accident for five years.

The worker was not entitled to benefits. She was able to continue working for two years after the accident. In 1982, she also suffered a non-compensable back injury. The Panel found that the worker's back disability was related to progression of degenerative disc disease and not to an accident in 1980. [6 pages]

DECISION NO. 1093/87 (05/01/90) Kenny Robillard Meslin

Continuing entitlement.

The worker suffered a low back strain in February 1985 and received benefits until April 1986.

The worker was not entitled to further benefits for organic disability. Medical tests indicated no organic basis for ongoing disability. There was nothing about the accident or injuries sustained to suggest that it would continue to be a source of disability after this much time. [8 pages]

DECISION NO. 938/89L (08/01/90) Marafioti Lebert Nipshagen

Leave to appeal (good reason to doubt correctness) (consideration of evidence).

The Appeal Board denied entitlement for a hand disability, and confirmed that decision in a reconsideration. The Panel found that there was good reason to doubt the correctness of the Appeal Board decision. On the reconsideration there was substantial new evidence indicating the possibility of an organic hand disability, but this was not definitely and specifically adjudicated upon by the Appeal Board.

Leave to appeal granted. [4 pages]

DECISION NO. 5/90 (09/01/90) Strachan Robillard Meslin

Access to worker file, s.77.

Access to the worker's file was granted to the employer, except for deletion of several sentences from one report. [4 pages]

DECISION NO. 1026/89 (09/01/90) Strachan Robillard Apsey

Cancer (lung) - Foundry worker.

A foundry worker died of lung cancer. The issue was whether he had 20 years of work in a foundry, as required by Board policy.

Records were incomplete but the Panel determined that, from 1938 to 1968, the worker worked in at least nine different foundries for at least 18 years and 4 months. Of the 12 years that were not accounted for, the Panel found it reasonable to conclude that the worker worked in a foundry for at least 20 months. It was the worker's historical work pattern to seek that type of work.

The worker's widow was entitled to dependency benefits. [9 pages]

Board Directives and Guidelines: Claims Services Division Manual, s.122(1), p.266, Directive 17

DECISION NO. 942/88 (09/01/90) Carlan Lebert Jago

Supplements, temporary - Rehabilitation, vocational (cooperation).

In 1978, a 22 year old worker suffered a back injury. In July 1981, he was awarded a 40% pension. From January 1982 to March 1982, he received temporary benefits for an aggravation. The Appeals Adjudicator denied a temporary supplement from July 1981 to January 1982 and from March 1982 to January 1983.

The worker received rehabilitation assistance for the first time in July 1981. It took until November to set up an assessment of the worker's abilities. The worker did not complete the programme because he could not cope with it. There was no indication that he was uncooperative.

During the first period the worker could have been more active in his own rehabilitation. However, factors such as the severity of the injury, the long absence from work and the lack of other skills, contributed to the inactivity. These factors indicated that an aggressive rehabilitation would be needed if it was going to be successful; they did not establish that the worker failed to cooperate. The worker was entitled to a supplement during this period.

During the second period, the worker was uncooperative, maintained that he was totally disabled and was unwilling to look for work. He was disentitled from receiving a supplement during this period. [8 pages]

DECISION NO. 640/89 (11/01/90) Kenny Robillard Meslin*Continuity (of treatment).*

The worker suffered a low back strain in 1980 and returned to work after one week.

The worker was not entitled to benefits in 1984. The worker went to his doctor numerous occasions after his return to work but did not complain of back pain. It was likely that the current problems resulted from some underlying structural defect in the worker's back. [6 pages]

DECISION NO. 1017/89 (11/01/90) Moore McCombie Howes*Withdrawal (of appeal).*

The worker appealed a decision of the Hearings Officer denying entitlement for a psychological disability resulting from a 1958 accident. A different claim relating to a 1980 accident had been dealt with by the Claims Review Branch but had not yet been appealed to the Hearings Officer.

The Panel allowed the worker to withdraw the appeal in order to pursue entitlement for psychiatric disability under the 1980 claim. [4 pages].

DECISION NO. 991/89 (11/01/90) Strachan Heard Shuel*Fibromyalgia - Medical opinion (fibromyalgia) - Medical opinion (myofascial pain syndrome).*

The worker slipped and fell in September 1982. She received benefits until June 1984. In November 1987, the worker died as a result of complications from surgery for a non-compensable condition. The worker's estate appealed a decision of the Appeals Adjudicator denying benefits subsequent to June 1984.

The organic disability had resolved by June 1984. There was medical opinion that non-organic disability was related to preexisting personality traits and not to the compensable accident.

There was another medical opinion that the worker was suffering from regional fibrositis. Medical literature, on which this opinion was based, stated that regional fibrositis (myofascial pain syndrome) could be differentiated from fibromyalgia (fibrositis). Essential to the diagnosis of regional fibrositis is the existence of regional trigger points. Fibromyalgia is characterized by multiple, widespread tender points.

The Panel found that the medical report noted clearly only one trigger point, but did not refer to other trigger points, which according to the literature, were essential to the diagnosis. Since the worker had died, the Panel could not obtain further examination of the worker by Tribunal consultants. On the balance of probabilities, the worker's low back pain was not attributable to myofascial pain syndrome. The appeal was dismissed. [11 pages]

DECISION NO. 499/89 (11/01/90) Strachan Heard Shuel*Hearing loss - Notice of hearing.*

The worker appealed a decision of the Appeal Board denying entitlement for hearing loss. The Panel found that the worker was exposed to noise in excess of 100 decibels during 14 months in 1955 and 1956 when he was working as a press operator for a previous employer. He was also exposed to noise in excess of 90 decibels while working on the soda ash kiln floor of a chemical manufacturer from 1959 to 1978. The appeal was allowed.

The Panel referred the case back to the Board for an assessment and any investigation of apportionment of responsibility between the two employers. The Panel noted that the previous employer would thus have an opportunity to make submissions at the Board level on the degree of its responsibility. [10 pages]

WCAT Decisions Considered: 499/89L

Board Directives and Guidelines: Claims Services Division Manual, s.122, p.270, Directive 19

DECISION NO. 883/89L (11/01/90) McGrath Heard Preston

Leave to appeal (good reason to doubt correctness) (consideration of evidence) - Leave to appeal (substantial new evidence) (medical report).

The application for leave to appeal an Appeal Board decision which denied the worker entitlement for disablement of his cervical and lumbar spine was dismissed. The worker was required to bend and reach over a wide table 2,200 times per day.

There was no substantial new evidence. Degenerative disc disease, osteoarthritis, spinal stenosis, cervical spondylosis and even the possibility of nuclear disc herniation had all been diagnosed prior to the Appeal Board hearing. The new medical report presented on the worker's behalf merely elaborated on a medical opinion that was available to the Appeal Board.

There was no good reason to doubt the correctness of the Appeal Board decision. The Appeal Board had sought clarification of the material in the worker's file and invited submissions on the resulting report. Though more detailed reasoning would have been preferable, there was no doubt that the Appeal Board had considered all the evidence. There was no obvious oversight with respect to critical evidence. [6 pages]

WCAT Decisions Considered: Decision No. 131 (1986), 2 W.C.A.T.R. 77

DECISION NO. 1018/89 (12/01/90) Strachan Fox Clarke

Continuing entitlement.

The worker suffered laceration of his left hand in an accident in February 1986. He received benefits until June 1986. He also received benefits for surgery in 1987.

The Panel found that the worker was entitled to full temporary partial disability benefits from June 1986 until he returned to work in September 1986. He was partially disabled by a severed radial nerve. Although there was some possibility that he could have performed his regular job after June 1986, the Panel extended the benefit of the doubt to conclude that the disability precluded a return to regular work during that period. [6 pages]

DECISION NO. 13/90 (12/01/90) Strachan Jackson Preston

Dependency benefits (remarriage) - Human rights.

The worker's widow appealed a decision denying reinstatement of dependency benefits. The worker died during the course of employment in 1961. She received survivor benefits under the Act. In 1963, she remarried, and received a two-year lump sum payment in accordance with s.37 of the pre-1985 Act. In 1970, she divorced. She asked for reinstatement of benefits now that she was divorced.

Section 37 of the pre-1985 Act provided that monthly payments would cease upon remarriage but that there would be entitlement to a lump sum. Section 133(2) of the pre-1989 Act provided that s.37 continued to apply to a dependent widow who remarried before the coming into force of the section. Section 133(2) clearly indicated that there should be no change in the effect of s.37 on the pre-1985 claims.

Section 1 of the Human Rights Code, 1981, providing for equal treatment with respect to services without discrimination based on marital status, did not apply since services does not include a levy, fee, tax or periodic payment imposed by law.

The appeal was dismissed. [6 pages]

WCAT Decisions Considered: Decision No. 765 (1988), 9 W.C.A.T.R. 21; Decision No. 137/87 (1987), 5 W.C.A.T.R. 115
Other Statutes Considered: Human Rights Code, 1981, S.O. 1981 c.53, ss.1, 9(1)(i), 46(2)

DECISION NO. 940/89 (12/01/90) Starkman Heard Nipshagen

Available employment (offer from accident employer).

A baker's helper suffered a low back strain in October 1986. He returned to work on March 8, 1987, but laid off again because the job involved extensive bending, twisting and lifting, which was not suitable for his restrictions. On March 27, 1987, the employer offered the worker a supervisory job which was within his capabilities. On the evidence, this job offer remained open for the remainder of 1987. In addition, the worker did not make any serious effort to find alternate work during this period.

The worker was entitled to full partial disability benefits from March 8 to March 27 but was not entitled to benefits thereafter. [7 pages]

DECISION NO. 1053/89 (12/01/90) Onen McCombie Meslin

Causation (heart attack) - Heart attack - Exposure (welding fumes).

The worker's widow appealed a decision of the Hearings Officer denying dependency benefits for the worker's death from a heart attack. The worker was a welder in a mine. On the day of his heart attack, the worker had to repair a blasting door in a loading pocket of a shaft. He had to climb 100 feet down to a series of ladders in a manway to reach the loading pocket and a further 20 feet to reach the specific blasting door. He had to make this climb three times. Since no ore could be processed through the loading pocket until the repairs were complete, the worker and his co-workers worked through lunch. In addition, there was no forced air in the area where the worker was working.

The worker was welding and fabricating in a confined area with no direct ventilation. He was exposed to smoke and welding fumes which had no means of escape other than through the manway. The shaft in which the worker was working was the oldest in the mine. It was the only shaft which required a lengthy descent by ladder. The worker also had to go up and down the ladders an unusual number of times. There was a close temporal relationship between the physically demanding activities and the heart attack. The cause of death was coronary artery insufficiency. Evidence indicated that this type of heart attack may be related to recent physical exertion. The Panel found that the worker's death arose out of employment.

The appeal was allowed. [12 pages]

Board Directives and Guidelines: Claims Services Division Manual, s.1(1)(a), p.8, Directive 6

DECISION NO. 984/89 (15/01/90) Bigras Fox Nipshagen

Continuing entitlement - Medical report (clinical notes).

The employer appealed a decision of the Hearings Officer granting benefits subsequent to July 1985. The worker suffered a shoulder injury in November 1982. The Board granted benefits until May 1983. In Decision No. 632, a different Panel of the Tribunal granted benefits until July 1985, making no findings beyond that date.

In a preliminary matter, the Panel denied an application by the employer for the Panel to obtain the clinical notes of a treating doctor. The Tribunal had jurisdiction to obtain such notes and might do so if there were a lack of medical information, where doctors were reluctant to reveal details of examinations or to give the background of their diagnosis. However, in this case, further information was not required.

On the evidence, the worker continued to suffer from the shoulder disability subsequent to July 1985. The appeal was dismissed. [7 pages]

WCAT Decisions Considered: 632

DECISION NO. 6/90 (15/01/90) Bigras Cook Nipshagen

Access to worker file, s.77.

Access to the worker's file was granted to the employer. [3 pages]

DECISION NO. 7/90 (15/01/90) Bigras Cook Nipshagen

Access to worker file, s.77.

Access to the worker's file was granted to the employer, except for one document, since release of that document would not serve any useful purpose and would divulge information concerning other workers. [3 pages]

DECISION NO. 960/89 (15/01/90) Bigras Drennan Apsey

Penalties (new owner).

The employer appealed a decision of the Hearings Officer confirming a penalty assessment for the years 1983-85.

The employer was purchased by another company in 1987. However, this was not a reason to set aside the assessment.

The new owner made substantial efforts to improve safety. These safety measures were instituted two years after the period in issue. During the two-year period, the employer continued to have an unfavourable record.

There were no grounds to set aside the assessment. The appeal was dismissed. [9 pages]

WCAT Decisions Considered: Decision No. 255/87 (1987), 5 W.C.A.T.R. 147

Regulations Considered: Reg. 951, s.6

Board Directives and Guidelines: Additional Assessments Policies and Procedures, Board Minute #6, January 14, 1975

DECISION NO. 949/89 (15/01/90) Bigras Fox Apsey

Disablement (repetitive work) - Venous condition - Varicose veins - Sewing machine operator.

A 38 year old sewing machine operator appealed the decision of the Hearings Officer denying entitlement for a venous condition. The worker laid off in April 1986 with a circulatory problem, originally diagnosed as a thrombosis in the superficial femoral vein of the right thigh. The worker worked part of the time on a machine that had a mechanical paddle at knee level to raise and lower the head of the machine. Prior to her lay-off was a very busy period when the worker was working full time on a machine requiring operation of the knee paddle.

The Panel found that the circulatory condition was related to the repetitive work using the paddle. This problem subsided by October 1986, when the worker required treatment for varicose veins. The worker had a problem with varicose veins 10 years earlier. This was the first recurrence of that problem. The Panel found that varicose vein problem was also related to the worker's employment. The worker was entitled to benefits until May 1987 and to a pension assessment.

The Panel did not deal with the issue of entitlement for osteoarthritis and sympathetically maintained pain. [13 pages]

DECISION NO. 931/89 (15/01/90) Kenny Robillard Meslin

Disablement (strenuous work) - Osteoarthritis (knee) - Forestry.

A forester appealed a decision of the Hearings Officer denying entitlement for osteoarthritis of the knees. In the months from September to May, the worker spent 60% - 75% of his time from 1966 to the late 1970s climbing trees using tree spurs. From then to 1984, he climbed trees 40% - 50% of the time.

There was supportive medical evidence regarding the relationship between osteoarthritis and regular use of tree climbing spurs. The worker was entitled to benefits. [8 pages]

DECISION NO. 606/89 (15/01/90) Kenny Beattie Preston

Continuing entitlement.

The employer appealed a decision finding that the worker's continuing back problems after 1985 were causally related to his 1978 work injury.

The worker had degenerative disc disease in 1978 with reactive bone sclerosis present. However, this condition was asymptomatic at the time of the accident. The mechanics of the accident were such that it could have been significant. The worker returned to work after six weeks but continued to suffer from back pain. Though the worker maintained a good work attendance record and had little medical treatment between 1978 and 1985, statements from his post-1978 work supervisors confirmed ongoing significant back problems.

The work injury was a significant cause of the worker's ongoing back disability. Appeal dismissed. [7 pages]

DECISION NO. 462/89 (16/01/90) Faubert Fox Apsey*Continuing entitlement.*

A bus driver suffered a soft tissue injury to his right shoulder and neck in July 1985. He received benefits until June 1986.

The worker was not entitled to continuing benefits for temporary disability subsequent to June 1986. Medical evidence did not disclose any organic basis for ongoing complaints of numbness, pain and loss of power in the right arm. The worker worked for a short time in July 1986 and indicated that he would have continued to work if further employment had been offered. The worker was concerned about his ability to continue working, but medical reports indicated a number of non-compensable problems, such as eye infection and dizziness. [7 pages]

DECISION NO. 828/89 (16/01/90) Lax Fox Seguin*Commutation (vehicle purchase) - Board Directives and Guidelines (commutation).*

The worker suffered a right knee injury, for which he was receiving a 12% pension and a pension supplement. The worker was enrolled in a Board-sponsored retraining programme at a community college, which was 20 miles from his home. The worker had a car with standard transmission but was no longer able to operate it safely due to his disability. He requested a partial commutation of his pension to purchase a car with automatic transmission. The request was denied. The worker purchased the car with a bank loan. He completed the course but did not yet have a job.

The commutation request met the criteria in the April 1987 Board policy: there was a specific rehabilitative purpose of enabling him to engage in a retraining programme; although the worker was able to obtain bank financing, this was not suitable alternative financing since his ability to repay the bank loan depended on uncertain income; his ability to meet ongoing financial obligations would not be jeopardized; counselling was explored.

Guidelines in January 1988 pursuant to the Board policy were contradictory as to a requirement that an unemployed worker must have a firm job offer at the time a commutation request is made. Guidelines in March 1989 did not require a direct link between the commutation and employment. After the hearing, the Panel ascertained that the 1988 guidelines were only approved by the executive committee of the Board and were superceded by the 1989 guidelines, which were approved by the board of directors of the Board.

The Board was directed to commute the worker's pension in the amount sufficient to pay off the car loan. [12 pages]

WCAT Decisions Considered: Decision No. 16 (1986), 1 W.C.A.T.R. 62; Decision No. 100/88
Board Directives and Guidelines: Commutation of Pensions Policy, Board Minute 4, April 3/87, p.5186;
Guidelines for the Commutation of Pensions, January 15, 1988; Guidelines for the Commutation of Pensions Policy, Board Minute 3, Mar. 20/89, p.71

DECISION NO. 881/89 (16/01/90) Hartman Robillard Ronson*Consequences of injury (altered gait) - Significant contribution
(of compensable accident to subsequent disability) - Susceptibility - Disc (degeneration).*

The worker suffered a severe fracture to his right leg in 1959, resulting in leg length discrepancy. The worker claimed entitlement for lay-offs in 1984, 1985 and 1989 due to degenerative disc disease.

The worker did not claim that the accident caused the disc disease or that it aggravated an underlying condition. He submitted that the symptomatology from the degenerative disc disease was more severe due to the discrepancy in leg length. Medical opinion supported the worker's submission in general.

In assessing compensability, the Panel considered each period of disability individually to determine whether there was a compensable aspect involved. For the period in 1984, there was medical opinion relating the flare-up of symptoms to the leg length discrepancy. There was no direct medical evidence for the period in 1985 but, considering proximity to the period in 1984, the Panel concluded that the 1985 flare-up was a continuation of the 1984 flare-up. The worker was entitled to benefits for these two periods.

There was a gap of over four years in medical documentation to the lay-off in 1989. This period could be investigated and determined by the Board at first instance.

There may come a time when the leg length discrepancy is no longer significant to the symptoms arising from the disc disease. The finding of entitlement for the periods in 1984 and 1985 should not be construed as a precedent for other episodes of symptomatology. [7 pages]

DECISION NO. 14/90 (16/01/90) Strachan Robillard Gabinet

Pensions (assessment) (wrist).

The worker appealed a decision of the Hearings Officer denying an increase in the worker's 5% pension for a left wrist disability. The award seemed to be based on complaints of pain and weakness. Medical reports indicated no concrete organic basis for the symptoms. Medical reports since the last pension examination indicated that the worker's condition was essentially unchanged. The appeal was dismissed. [10 pages]

WCAT Decisions Considered: Decision No. 915 (1987) 7 W.C.A.T.R. 1

DECISION NO. 859/88 (17/01/90) Sperdakos Cook Guillemette

Supplements, temporary - Significantly greater than is usual - Rehabilitation, vocational (cooperation).

The worker appealed a decision of the Hearings Officer denying a temporary supplement from January 1981 to April 1981 and subsequent to April 1983.

The worker had been a forklift driver. He had bilateral knee disabilities and was unable to return to his former job. He also had restrictions against bending which prevented him from performing a variety of other jobs, such as clothing salesman. The Vocational Rehabilitation Division acknowledged that a job with pre-accident income was unrealistic. The Panel found that the worker's impairment of earning capacity was significantly greater than usual.

For the period from January 1981 to April 1981 and for the period from April 1983 to March 1984, the worker was entitled to a supplement. In March 1984, the worker abandoned an assessment programme to determine his capabilities. He appeared to have decided that he could not work or that there were specific jobs which he should seek but that he did not need to look for other work in the meantime. The worker was not entitled to a supplement subsequent to March 1984. [20 pages]

Board Directives and Guidelines: Claims Services Division Manual, s.45(5), p.134, Directive 1

DECISION NO. 980/89 (17/01/90) Bradbury Cook Meslin

Causation (stress) - Stress (standard of proof).

The worker appealed a decision of the Hearings Officer denying entitlement for stress. The worker worked since 1971 as a stenographer. In the early and mid 1980s, the employer gradually laid off almost half its work force due to economic conditions. The worker's job was discontinued in 1986 and she was transferred to a different job, which she was unable to do. After further reassignment and grievances, the worker was given a job in the mail room. After being spoken to by her supervisor, the worker left work feeling ill and did not return. The worker's doctor diagnosed her stress condition as anxiety reaction.

The Panel agreed with Decision No. 1018/87 that the causation question in stress cases is complex and that the evidentiary burden is a difficult one but that a higher test is not warranted. It is necessary to establish: 1) that a psychological disability exists and disables the worker from performing the functions of the job; 2) that the disability is work related. This requires evaluation of the various stressors in the work place including consideration of whether they are usual or unusual, whether other workers were affected and whether the stressors were typical, expected or unexpected; 3) if there is a disability and the work place made a contribution, whether the work place contributed significantly to the development of the disability. This requires comparison of the worker's personal situation with the contribution of the work situation.

After considering medical reports submitted by the worker, the Panel found that the worker was not suffering from a stress disability. The evidence indicated that the worker was angry and upset but not disabled from working. She felt that she could perform her former job. She was able to do housework and care for her children. She believed that she was being harassed and picked on at work, but this belief was not supported by the evidence. There was no evidence of a true psychological disturbance. The Panel was not convinced that the worker was suffering from a condition which disabled her from working.

The appeal was dismissed. [9 pages]

WCAT Decisions Considered: Decision No. 918 (1988), 9 W.C.A.T.R. 48; Decision No. 1018/87 (1989), 10 W.C.A.T.R. 82

DECISION NO. 594/89L (17/01/90) Marcotte Heard Jago

Leave to appeal (good reason to doubt correctness) (bias) - Leave to appeal (good reason to doubt correctness) (natural justice) - Leave to appeal (good reason to doubt correctness) (delegation of authority) - Natural justice (opportunity to make submissions) - Parties (of record) (previous employer).

The worker sought leave to appeal a decision of the Appeal Board, which denied him entitlement to a supplement from January to May 1978. The worker had been a miner until a 1972 work accident led to the amputation of his leg.

On a preliminary matter, the worker protested the Tribunal's decision to forward a copy of the leave record to a prior employer who had no interest in the application. The Panel stated that it would recommend that the Tribunal undertake an assessment of procedures designed to protect workers' rights to confidentiality, within the context of the legislation and natural justice.

The Appeal Board did not err in finding that the worker's reduced earnings from January to May 1978 were due to his unemployment rather than his disability. The worker had been hired with his disability and was laid off due to a lack of work. Given the worker's obtaining of a bachelor's degree with the Board's help,

it was not unreasonable for the Appeal Board to conclude that his qualifications for employment were at least equal to his pre-accident qualifications.

Though one of the Appeal Board panel members had worked for the accident employer, he was retired at the time of the hearing and had worked at a different site than the worker. There was no conflict of interest in the subject matter of the appeal. Moreover, the worker had raised no objection at the Appeal Board hearing.

The Appeal Board directed the Claims Services Division to re-evaluate the worker's entitlement to a supplement. The failure to provide the worker an opportunity to make submissions on the Claims Service Division's re-evaluation could arguably have resulted in the denial of due process. However, as that was a common Appeal Board practice at the time, the worker was not discriminated against or treated unfairly. The Appeal Board did not improperly delegate this decision to the Claims Services Division as it considered the resulting documentation and then made the decision required of it.

There was no good reason to doubt the correctness of the Appeal Board decision. [8 pages]

WCAT Decisions Considered: Decision No. 131 (1986), 2 W.C.A.T.R. 77

DECISION NO. 974/89 (18/01/90) Bigras Lebert Apsey

Delay (reporting injury).

The worker appealed a decision of the Hearings Officer denying entitlement for a left inguinal hernia. The 62 year old worker claimed that he felt a pain while working in November 1987 but did not report an injury. In January 1988, the hernia was diagnosed during the course of a regular check-up.

The worker was credible. The Panel accepted his explanation for failing to report the injury that he was afraid of losing his job. The appeal was allowed. [5 pages]

Cases Considered: Decision No. 316 (1979), 5 B.C.W.C.R. 43

DECISION NO. 943/88 (18/01/90) Carlan Lebert Jago

In the course of employment.

The worker was a sole proprietor and executive officer of a lumber company. Since 1978, he had been in receipt of full benefits, except for brief periods of time. In July 1984, he was involved in a motor vehicle accident. He submitted that he was in the course of employment at the time since he re-entered the work force because of concerns regarding cutting rights and WCB Assessments and was travelling to Toronto respecting these issues.

The Panel found that the worker was not in the course of employment. There were people who would have known that the worker was travelling to Toronto for business purposes, such as the worker's son and daughter-in-law, who were actively involved in the business, and others as well. However, none of these people were able to substantiate the worker's story. [4 pages]

DECISION NO. 398/89 (18/01/90) Starkman Drennan Jago

Apportionment (industrial disease).

The employer appealed a decision of the Hearings Officer confirming the charging of the costs of an

industrial disease claim to the employer's accident cost record. The worker was a refrigeration mechanic who worked for a number of employers from 1958. In 1985 he died from mesothelioma. The accident was charged to the accident cost record of the last employer.

The Panel found that s.122(8) imposed a mandatory obligation on the Board to charge or apportion the costs of an industrial disease claim to the class or classes of employer that it deems appropriate. There is nothing in the section to suggest that the Board can charge the cost to the accident cost record of individual employers, for purposes of penalty assessments, etc.

The Panel found that the section was clear and unequivocal. The Panel also noted s.8(9), which allows apportionment between classes or groups and to the accident cost record of individual employers.

Section 122 established a regime for allocation of costs of industrial disease claims which is different than for non-industrial disease claims. If the Legislature had intended that the costs of industrial disease claims be charged to individual employers, there would have been no need to enact s.122(8).

The appeal was allowed. The Panel directed that the costs of the claim not be charged to the employer and that the Board investigate to determine the class or classes against which the compensation should be charged. [13 pages]

DECISION NO. 62/89 (19/01/90) Stewart Lebert Kowalishin

Arising out of employment (recreational activity) - Arising out of employment (employer's premises) - Arising out of employment (lunch) - Arising out of employment (reasonably incidental activity test) - In the course of employment (recreational activity) - In the course of employment (employer's premises) - In the course of employment (lunch) - In the course of employment (reasonably incidental activity test).

The worker appealed a decision of the Hearings Officer denying entitlement for an ankle injury suffered while playing volleyball on the employer's premises during an unpaid lunch period. The game was arranged pursuant to an employer initiative described as a wellness system but participation was voluntary. The employer was in a remote location, so that, on a practical basis, workers had to remain on the premises during lunch.

Although the activity was voluntary and not work-related, it was sanctioned by the employer and took place regularly on the employer's premises in an isolated work environment. The Panel applied a reasonably incidental activity test to determine that the accident arose out of and in the course of employment. The appeal was allowed. [9 pages]

WCAT Decisions Considered: Decision No. 44 (1986), 2 W.C.A.T.R. 8; Decision Nos. 373, 83/87, 817/87, 1230/87 Board Directives and Guidelines: Claims Adjudication Branch Procedures Manual, Document no. 33-14-01; Claims Services Division Manual, s. 3(1), p. 47, Directive 21
Cases Considered: Decision No. 273 (1978), 4 B.C.W.C.R. 16; McNamara v. Town of Hamden, 176 Conn 547, 398 A. 2d 1161; Vaccaro v. Sperry Rand Corp., 83 A.D. 2d 678, 422 N.Y.S. 2d 243

DECISION NO. 303/88 (19/01/90) Bigras Lebert Nipshagen

Exposure (pigeon droppings) - Medical opinion (transverse myelitis) - Medical opinion (psittacosis) - Chance event - Transverse myelitis - Psittacosis.

The worker appealed a decision denying him entitlement to benefits for transverse myelitis, an inflammation of the spinal cord which had rendered him a quadriplegic.

The worker was exposed to pigeon droppings and feathers in late August of 1981 while working as a desk

clerk at a hotel. The Panel found that as a result of this exposure, the worker contracted psittacosis (ornithosis) an infectious disease found in birds and transmitted to humans by inhaling the viral agent from dried excreta of infected birds. Only a very short period of exposure is required for transmission of the disease to humans. Serological tests revealed the presence of psittacosis in September/October 1981. The exposure and diagnosis in this case fell within the time frame for incubation of the disease.

The worker's exposure to the pigeon droppings constituted "a chance event occasioned by a physical or natural cause" within the meaning of s.1(1)(a)(ii).

Both psittacosis and myelitis are rare in Canada. The prevailing theory among the doctors involved (though it could not be proved by the present state of medical science) was that in this case an auto-immune reaction of the psittacosis infection caused the myelitis. Since there was no other likely cause, the Panel found on the balance of probabilities that the worker's myelitis condition was caused by his psittacosis infection.

The appeal was allowed. [19 pages]

WCAT Decisions Considered: Decision No. 915 (1987), 7 W.C.A.T.R. 1; Decision No. 303/88L

DECISION NO. 654/88I (19/01/90) Signoroni Cook Apsey

Pensions (assessment).

The worker appealed the 2% level of his pension. He had suffered a deep laceration of his right wrist. Subsequent surgery resulted in the removal of a neuroma during exploration of the radial nerve of the right wrist. Bilateral carpal tunnel decompressions were performed at the same time.

The Board's adjudication of this claim had proceeded on the basis that the worker had both compensable and non-compensable components to his wrist disability, the non-compensable ones being attributable to bilateral carpal tunnel syndrome. The Panel found that assumption to be questionable, based on the medical report of a specialist which stated that it was unlikely that any of the worker's wrist disabilities was due to carpal tunnel syndrome.

The matter was referred back to the Board to provide a fresh assessment of the impairment of earning capacity resulting from the wrist disability. [10 pages]

DECISION NO. 867/89L (19/01/90) Hartman Robillard Seguin

Leave to appeal (substantial new evidence) (medical report).

The worker suffered a compensable minor back strain in 1967. The Appeal Board denied benefits for a back condition in 1980. A new medical report related the worker's condition to the compensable accident but it was based on the worker's statements that he had continuing symptoms from 1967.

Leave to appeal denied. [6 pages]

DECISION NO. 141/88 (22/01/90) Bradbury Klym Guillemette (dissenting)

Aggravation (preexisting condition) (osteochondritis) - Consequences of injury (iatrogenic illness) (medication) (renal failure).

The worker suffered a knee injury in 1980 and returned to work in 1981. The worker appealed a decision of the Hearings Officer denying entitlement from May 1981 to June 1981 for nosebleeds, from June 1983 to June

1984 for renal failure, from November 1984 to September 1985 for further knee disability and for the cost of prescription drugs.

The Panel found that the worker was not entitled to benefits for the nosebleeds. There were related to non-compensable high blood pressure.

The majority of the Panel found that the worker was entitled to benefits for the knee condition in 1984 and 1985. The accident aggravated serious but asymptomatic preexisting osteochondritis dissecans. The worker had continuing problems after the accident and his condition never returned to its pre-accident state. The worker was also entitled to the cost of drugs prescribed for the knee condition.

In June 1983, Motrin was prescribed for the knee condition. On the evidence, the Motrin precipitated the acute renal failure but it did not cause the condition and has had only minimal permanent effect. The kidney impairment was primarily related to underlying non-compensable atherosclerosis. The worker was entitled to benefits on an aggravation basis for the effects of Motrin from June 1983 to July 1983.

The Employer Member, dissenting, found that the continuing knee condition was related to the preexisting condition and not to the compensable accident. Accordingly, the worker was not entitled to benefits in 1984 and 1985 for the knee condition or for the cost of prescription drugs, including Motrin. Since there was no ongoing entitlement, the worker was not entitled to benefits for the reaction to Motrin. [16 pages]

WCAT Decisions Considered: 993/87, 1030/87, 1055/87

DECISION NO. 909/89 (22/01/90) Onen McCombie Preston
581278 Ontario Ltd. v. Picado

Section 15 application - In the course of employment (multi-storey buildings) - Arising out of employment (reasonably incidental activity test) - Registration of employer - Employer (definition of).

The employer was a tenant on the second floor of a building. The worker fell on the stairs leading to the second floor while proceeding to work in the morning.

The employer was a Schedule 1 employer even though it had not registered with the Board at the time of the accident. The worker was in the course of employment at the time of the accident. The stairs was a common area within the building and, according to Board policy, would be considered the employer's premises. The stairs was not a public place and the worker was not exposed to the same risks as experienced by the public outside the building. Her activity, of climbing the stairs to reach the premises and start her work day, was reasonably incidental to employment. Further, the accident arose out of employment since the activity was reasonably incidental to her employment. The worker's right of action against the employer was taken away.

The company owning the building had no workers. Its two principals had not applied for personal coverage. Accordingly, the owner was not an employer. The right of action against the building owner was not taken away. [10 pages]

WCAT Decisions Considered: Decision No. 229 (1986), 2 W.C.A.T.R. 118; Decision No. 965/871 (1988), 8 W.C.A.T.R. 214; Decision No. 525
Board Directives and Guidelines: Claims Services Division Manual, s. 3(1), p.47, Directive 21

DECISION NO. 758/89 (22/01/90) Onen Beattie Meslin

Accident (occurrence) - Credibility.

The worker appealed a decision of the Hearings Officer denying entitlement for bilateral wrist

disability. The worker claimed that he tripped and fell at work on the morning of May 17. The previous night, the worker was found in the women's washroom at a shopping mall. While trying to escape from a security guard, he fell down stairs. The worker was charged and acquitted of fraud regarding his claim.

The Panel accepted evidence from the security guard, a cleaner at the mall and police officers that the worker was experiencing problems with his hands at the mall. All these witnesses had no personal interest in the matter. The Panel preferred their evidence to the evidence of the worker's parents and a friend. The employer questioned the occurrence of the accident even before being aware of the incident at the mall.

On the evidence, the Panel found that the worker injured his wrists at the shopping mall. The appeal was dismissed. [12 pages]

DECISION NO. 1001/89 (22/01/90) Bigras Higson Shuel

Supplements, older worker - Significantly greater than is usual.

The worker suffered a low back sprain, for which he was receiving a pension. The worker was not entitled to an older worker supplement to his pension. On the evidence, the impairment of earning capacity resulting from the compensable disability was not significantly greater than is usual. The worker was suffering from non-compensable diabetes with resulting severe eyesight problems. It was this and other non-compensable disabilities which rendered the worker unemployable. [5 pages]

DECISION NO. 749/89 (22/01/90) Bigras Cook Kowalishin

Pensions (lump sum) - Pensions (lump sum) (amalgamation of claims) - Board Directives and Guidelines (commutation) (10% pension).

The worker appealed a decision denying the commutation of his 6% wrist pension.

The Hearings Officer denied the commutation pursuant to s.26(1) on the basis that it did not meet the requirement of the Board's policy that the commutation must either reduce the effects of a compensable disability or reduce the impact of the financial situation causing a disability. However, the application of this Board policy to the commutation of pensions not exceeding 10% would not be consistent with the intent of s.45(4). In such cases the worker is entitled to a commutation unless it is shown that the commutation would not be to the advantage of the worker.

The Hearings Officer's other reason for denying the commutation was that it was contrary to Board policy to grant a commutation under s.45(4) when the worker's condition may deteriorate. The Panel agreed with that Board policy. However, since only the Board's doctor mentioned the possibility of future wrist fusion, the medical evidence did not support the view that the worker's condition might deteriorate.

The worker suffered a compensable back injury subsequent to the wrist injury. Considering the Tribunal's "whole person" approach to determining total disability, the second injury could be a relevant factor in determining the commutation request. However, since there was no evidence that the back injury was permanent or was deteriorating, it did not provide a medical reason for denying the commutation in this case.

As there was no medical or financial disadvantage to the worker in awarding the commutation, the worker was entitled to receive his pension in a lump sum. [7 pages]

WCAT Decisions Considered: 69/89, 223/89, 386/89, 697/89

Board Directives and Guidelines: Policy, Commutation of Pensions, Board Minute #4, April 3, 1987, p. 5186

DECISION NO. 1050/89 (23/01/90) Onen Fox Cabinet*Commutation (debt liquidation).*

The worker appealed a decision of the Hearings Officer denying commutation of the worker's pension. The worker was a truck driver who now owned and operated a variety store. The worker wanted to reduce debts, which would allow him to hire more help, thereby allowing him more leisure time.

The worker's business was successful and he was not experiencing financial problems. There was not evidence of a relationship between the commutation request, the disability and efforts at rehabilitation. The appeal was dismissed. [4 pages]

DECISION NO. 59/87R (23/01/90) Bigras Ferrari Meslin*Reconsideration (clarification of decision).*

In Decision No. 59/87, the Panel stated that the worker was entitled to total permanent disability benefits for psychological disability subsequent to October 1985. The use of the word "total" created an ambiguity. It was not the Panel's intention to assess the worker's permanent disability. The Panel intended to grant a permanent, as opposed to a provisional, award, but did not intend to determine the level of disability. The Panel clarified the decision by removing the word "total" and adding that the Board should determine the permanent disability rating. [5 pages]

WCAT Decisions Considered: Decision No. 915 (1987) 7 W.C.A.T.R. 1; Decision No. 59/87
Board Directives and Guidelines: Claims Services Division Manual, s.71(3), p.207, Directive 22

DECISION NO. 876/88 (23/01/90) Bigras Klym Jewell*Tinnitus - Pensions (assessment) (tinnitus) - Board Directives and Guidelines (tinnitus)
(unusual circumstances) - Discretion, Board (pension assessment) (fettering).*

The worker was awarded a 2% pension for tinnitus in 1980. He appealed a decision of the Appeal Board denying temporary benefits for lay-offs in 1982 and 1983 due to tinnitus and denying an increase in the 2% pension.

Old Board policy for tinnitus provided that pensions should not exceed 2% except in "unusual circumstances". New Board policy no longer makes provision for unusual circumstances. The Panel agreed with Decision No. 326/89 that this restriction unduly fetters the Board's discretion and that the Panel should not be bound by it. The Panel noted, though, that pension ratings are estimated from the nature and degree of the injury and that special circumstances are dealt with by supplements. "Unusual circumstances" which could be reflected in a higher pension could refer to a previously unidentified aspect of the worker's disability which has not been reflected in the disability award.

The Appeal Board denied entitlement apparently because it felt that the lay-offs were due to non-compensable psychological problems, such as depression. On the preponderance of evidence, the Panel found that there was no underlying psychological condition independent of the tinnitus condition.

To most tinnitus sufferers, tinnitus is a minor irritant. The worker was one of less than 5% of sufferers who is severely disabled by it. Accordingly, his condition presented "unusual circumstances". The worker was entitled to full temporary benefits for the two periods of layoff in 1982 and 1983.

The worker was experiencing symptoms from tinnitus that were similar to psychological conditions, including depression, insomnia and irritability. This previously unidentified aspect of the disability was not reflected in the pension nor was it reflected in the tinnitus benchmarks. The ratings for similar symptoms, whether from psychotraumatic disability or from tinnitus, should result in similar ratings. The Panel compared the worker's symptoms with the benchmarks for psychotraumatic disability, found that the worker fit in Category 2 and awarded an additional 25% pension retroactive to November 1982. The appeal was allowed. [28 pages]

WCAT Decisions Considered: Decision No. 915 (1987), 7 W.C.A.T.R. 1; Decision Nos. 407/88, 739/88, 876/88L, 326/89, 798/89

Board Directives and Guidelines: Claims Service Division Manual, s.122, p.270, Directive 19; Operational Policy Manual, Document no. 03-03-07; Document no. 04-03-07

DECISION NO. 922/89 (23/01/90) Hartman Heard Jago

Accident (occurrence) - Overpayment.

The employer appealed a decision of the Hearings Officer granting benefits to the worker. The worker claimed that he continued to work after being laid off in order to finish what he was doing and that he suffered a pulling injury when the rear wheel of a lift truck became stuck in a crack.

Considering the evidence of the work site and discrepancies in the worker's evidence, the Panel found that the worker did not suffer an accident. The appeal was allowed.

While the Panel was not able to conclude that the event occurred as alleged by the worker, it was not persuaded there was fraud involved. The worker had received about \$30,000 in benefits. The matter of overpayment was left to the Board with the direction to consider the Panel's comments and the circumstances of the case. [9 pages]

WCAT Decisions Considered: Decision No. 182 (1988), 10 W.C.A.T.R. 1; Decision No. 450

DECISION NO. 541/88 (23/01/90) Sperdakos Beattie Apsey

Continuing entitlement.

The worker suffered a back injury in December 1983 and received temporary benefits until January 1986. In September 1987, the worker was awarded a 10% pension retroactive to January 1986.

On the evidence, the worker was partially disabled beyond January 1986. However, the disability was permanent by that time. The worker was not entitled to further temporary benefits. [11 pages]

DECISION NO. 767/89 (23/01/90) Lax Klym Jago

Disablement (vibrations) (vehicular) - Vibrations (vehicular) - Disc (degeneration) (cervical).

The worker was employed as a mobile equipment operator from 1957 to 1985. Considering the medical evidence and literature, the worker was entitled to benefits for cervical degenerative disc disease.

Vehicular vibration was a significant contributing factor to development of the cervical disability. Since the condition was permanent, the worker was entitled to a pension assessment. [11 pages]

WCAT Decisions Considered: Decision No. 275 (1988), 8 W.C.A.T.R. 14; Decision No. 559/87 (1988), 9 W.C.A.T.R. 103; Decision No. 533/88

DECISION NO. 786/89 (24/01/90) Stewart Beattie Apsey

Disablement (strenuous work).

The worker packed vegetables into jars. She experienced a sudden onset of chest pain on September 10, 1986. The pain was a muscular sprain which resulted from the nature of the worker's work, which required her to stretch to reach the vegetables. The worker was entitled to benefits until September 24, 1986. Continuing disability was not related to the accident but, rather, to a preexisting shoulder condition and to degenerative disc disease. [6 pages]

DECISION NO. 1031/89 (25/01/90) Marafioti Robillard Apsey

Accident (occurrence).

The employer appealed a decision of the Hearings Officer granting benefits to the worker for a blood blister on her finger. Although the worker could not identify with certainty a specific incident leading to the blister, the Panel was satisfied that an accident occurred at work. Considering the speed and manner in which the worker was required to carry out her duties, it was likely that a blister could develop and perhaps even go undetected until a later period. The appeal was dismissed. [3 pages]

DECISION NO. 20/90 (25/01/90) Starkman Cook Jago

Delay (onset of symptoms) - Continuity (of treatment).

The worker slipped and fell in 1971, striking her mouth against a freezer and her left knee on the floor. The worker was not entitled to benefits for osteoarthritis of the knee. The worker did not complain of knee problems until six weeks after the accident. There was also a lack of continuity of treatment for knee disability from 1972 to 1980. In addition, the worker developed osteoarthritis in both knees. A causal relationship was not established on the balance of probabilities. [7 pages]

DECISION NO. 951/89 (25/01/90) Moore Heard Apsey

Earnings (basis) (aggravation).

The worker suffered knee injuries in 1983 and 1986. The worker's earnings were greater prior to the 1983 accident than the 1986 accident. The worker appealed a decision of the Hearings Officer calculating temporary benefits after the 1986 accident on the basis of earnings prior to the 1986 accident.

The Panel found that the 1986 accident was a distinct accident that significantly worsened the knee condition that the worker incurred in the 1983 accident. Prior to the 1986 accident, the worker was able to

work and was treated without surgical intervention. After the 1986 accident, the worker could not work and required surgical intervention. What happened after 1986 was not inevitable had the 1986 accident not occurred. The 1986 accident was accurately characterized as an aggravation of the preexisting condition but was not a "matter arising out of the original accident" as required by s.43(7).

The 1986 incident was a new accident that aggravated the serious preexisting compensable condition. Benefits were payable on earnings prior to 1986. The appeal was dismissed. [5 pages]

DECISION NO. 977/89 (26/01/90) Moore Lebert Apsey

In the course of employment (takes self out of employment) (misconduct) - Arising out of employment (intoxication) - Presumptions (section 3).

The employer appealed a decision of the Hearings Officer granting entitlement for a fatal accident. The worker was a crew member of a ship. At the time of the accident the worker was off duty and he had been drinking. The worker chose to leave the ship by jumping from the rail of the ship onto the dock. The worker slipped on the dock and fell backwards, struck his head, fell into the water and drowned. Drinking and jumping from the ship were both violations of the employer's rules.

The Panel found that the accident occurred in the course of employment. Worker's compensation was a no fault scheme. The act of leaving the ship was reasonably incidental to employment. The manner in which the worker left the ship did not change the nature of the activity. The breach of the employer's rules could have amounted to misconduct within s.3(1)(b) of the pre-1980 Act but that section was not applicable since the worker died.

The presumption clause applies when the accident occurs in the course of employment. Although the worker had been drinking, there was no evidence that the degree of intoxication was such that it negated the significance of the contribution of employment to the accident.

The appeal was dismissed. [6 pages]

WCAT Decisions Considered: 879/87, 99/89

DECISION NO. 112/89 (30/01/90) Strachan Robillard Preston

Supplements, temporary (rehabilitative purpose) - Suitable employment - Availability for employment (refusing suitable work) (personal reasons).

An automotive industry worker suffered a back injury for which she was receiving a 10% pension. The worker appealed a decision of the Hearings Officer denying a temporary supplement.

On the evidence, an engine line job offered to the worker was light work that came within her medical restrictions. Another job, involving sorting nuts and bolts, also was suitable but was refused by the worker apparently because her estranged spouse worked in the same general area.

In addition, there was no rehabilitative purpose to the supplement since the intractable nature of the worker's unusual impairment had become clear. Reasonable attempts had been made to provide rehabilitation services. These attempts were unsuccessful. There was no reason to expect further attempts to be more successful.

The appeal was dismissed. [10 pages]

WCAT Decisions Considered: Decision No. 915 (1987) 7 W.C.A.T.R. 1

DECISION NO. 1052/89L (30/01/90) Chapnik Cook Meslin

Leave to appeal (good reason to doubt correctness) (consideration of issue) - Jurisdiction, Tribunal (final decision of Board).

The worker applied for leave to appeal a decision of the Appeal Board denying a temporary supplement.

The Panel refused to allow the worker to expand the issues considered on the application since the other issues had either not been appealed at the Board or had been appealed to a Hearings Officer. Therefore, those other issues could either be appealed at the Board or appealed to the Tribunal as of right.

The Appeal Board denied the supplement, considering the impairment of earning capacity relating to the worker's finger injury only. It did not consider the effect of the worker's arm injury as well.

Leave to appeal granted. [5 pages]

DECISION NO. 36/90 (30/01/90) Onen Cook Clarke

Disablement (nature of work) - Preexisting condition (disc) (degeneration) - Disc (degeneration) (lumbosacral).

The worker appealed a decision of the Hearings Officer denying entitlement for a low back condition. The worker started working part-time as a ward aide in a hospital in February 1983 and switched to full-time in September 1983. In January 1987, she laid off due to an acute episode of low back pain.

The worker had a reasonably demanding job, involving lifting, bending, twisting and other physically demanding activities.

The worker was suffering from advanced degenerative disc disease at L5-S1. On the evidence, the Panel found that this began at least 25 years ago and had become increasingly symptomatic in 1982. The frequency of acute episodes increased gradually until January 1987 when the worker was unable to continue working. The condition reached an advanced stage after many years of intermittent symptoms and was the result of a naturally progressive disease. The appeal was dismissed. [9 pages]

DECISION NO. 1035/89 (30/01/90) Marcotte Higson Preston

Recurrences (compensable injury).

A self-employed bricklayer suffered compensable low back strains in January 1975 and May 1975, when he had personal coverage. He suffered a further low back strain in April 1979, when he did not have personal coverage.

The bricklayer was not entitled to benefits for the 1979 injury. He was able to return to work after the prior injuries. There was a lack of continuity of treatment. Medical evidence did not relate to the May 1975 injuries or the April 1979 injuries to those sustained on prior occasions. Rather, the 1979 injury was identified as the same type of injury as sustained previously. [8 pages]

DECISION NO. 887/89 (30/01/90) Stewart Lebert Clarke

Continuity (of treatment) - Procedure (absent parties).

The worker suffered a low back strain in June 1986 and was off work until July 1986. The worker

appealed a decision of the Hearings Officer denying entitlement for low back disability in 1987.

In a preliminary matter, the Panel decided to proceed with the appeal in the absence of the employer. The general manager of the employer advised by telephone that she had neglected to advise the owner of the date of the hearing. The Panel noted that the date had been agreed to by a representative of the employer and confirmed by the Tribunal.

The worker was not entitled to benefits in 1987, considering ability to return to full-time employment, lack of treatment, history of back problems and existence of degenerative disc disease. [6 pages]

DECISION NO. 53/90 (30/01/90) Carlan Fox Clarke

Withdrawal (of appeal).

The worker's representative requested withdrawal of the worker's appeal. The worker's representative was not at liberty to discuss the reasons for the request but indicated that it was unlikely that the worker would appeal again.

The worker was allowed to withdraw the appeal. If the matter came up again for another hearing, the future panel should be aware of this decision. [3 pages]

DECISION NO. 157/88 (30/01/90) Signoroni Acheson Meslin

Available employment (offer from accident employer) - Suitable employment - Rehabilitation, vocational (suitability of programme) (programme chosen by worker).

The worker suffered back injuries in 1980 and 1983, for which he was receiving a pension. The employer appealed a decision of the Hearings Officer granting temporary benefits from September 1985 to June 1986. The worker was temporarily partially disabled during the period in question. The worker's job involved quality control and floor inspection.

The employer did not offer the pre-accident job to the worker formally but he was entitled to it by the terms of a collective agreement. A letter from the employer's safety coordinator to the Board suggested that the employer was no longer prepared to offer employment. However, the worker, the Board and the employer did not rely on that letter. The worker's evidence showed that he was not interested in resuming work in an industrial setting. Rather, he wanted to, and did, enrol in teachers' college. The Panel found that the worker's pre-accident job was available.

On the evidence, the pre-accident job was fairly light work. The Panel considered the type of activity engaged in by the worker during the period in question at teachers' college, including practice teaching. There was no reliable evidence that the worker's disability prevented him from returning to his suitable available light duty job.

The worker's decision to attend teachers' college could not be considered a self-designated rehabilitative programme that would meet the requirements of s.41(1)(b)(i) of the pre-1985 Act. The worker did not place his plans before the Board or get even the tacit approval of the Board.

The appeal was allowed. [15 pages]

WCAT Decisions Considered: 144

DECISION NO. 997/89 (30/01/90) Onen Cook Kowalishin

Suitable employment - Rehabilitation, vocational (job search) - Epicondylitis - Board Directives and Guidelines (partial disability benefits) (suitable employment).

The worker was entitled to temporary benefits for the period from February to September 1987, as the work that she performed from July 1986 to February 1987 was unsuitable, given the restrictions imposed by her compensable right lateral epicondylitis disability.

The job involved stocking display stands with jewelry. This required rapid movement of the elbows, forearms and wrists with the arms above waist level and sometimes above shoulder level, without support. Heavy lifting was not necessary to suffer repetitive strain injuries such as epicondylitis.

Document no. 33-19-09 of the Claims Adjudication Branch Procedures Manual states that in cases where the worker contends that the work is not suitable, the worker should continue to receive total temporary benefits until the conflict is resolved. This guideline does not automatically entitle the worker to full benefits if the requirements of s.40 are not otherwise met. It does not apply where the Panel is in a position to consider the facts and determine the worker's entitlement under the terms of s.40.

Since the worker did not seek employment, which the medical evidence indicated that she was capable of performing from May to July 1987, she was only entitled to 50% benefits during that period. For the rest of the period from February to September 1987, she was entitled to total temporary benefits.

Board Directives and Guidelines: Claims Adjudication Branch Procedures Manual, Document no. 33-19-09

DECISION NO. 48/90 (31/01/90) Carlan Acheson Clarke

Access to worker file, s.77.

Access to the worker's file was granted to the employer, except for some documents which were not relevant. [3 pages]

DECISION NO. 15/90 (31/01/90) Bigras McCombie Sutherland

Chronic pain - Pensions (assessment) (back) - Pensions (assessment) (chronic pain).

The worker suffered a low back injury, for which he was receiving a 30% pension. He appealed a decision of the Hearings Officer denying entitlement to permanent benefits for chronic pain, which the worker claimed was aggravating his back condition and rendering him totally disabled.

The worker described symptoms of a lumbar condition for which he was already receiving a 30% pension, the maximum allowable under Board policy for the injury at issue. Therefore, it was irrelevant whether the worker had chronic pain or not.

In Decision No. 915, the Panel found that pension ratings were the Board's estimation of the impairment of an average person's earning capacity. That Panel reasoned that, unless a worker's disability was of a nature that it would disable the average person to a higher degree than the percentage recognized by the Board's rating, the Tribunal would not interfere with the rating. No such argument was made in this case.

It was argued that the worker's condition affected him more than it would affect the average worker. That argument could be relevant to the award of a supplement. However, that issue was not before the Panel. The appeal was dismissed. [5 pages]

WCAT Decisions Considered: Decision No. 915 (1987) 7 W.C.A.T.R. 1
Board Directives and Guidelines: Chronic Pain Disorder Policy Statement, Board Minute 2, July 3, 1987, p.5196

DECISION NO. 944/87LR(2) (31/01/90) Onen Fox Apsey

Leave to appeal (good reason to doubt correctness) (consideration of evidence).

The worker applied for leave to appeal a decision and two reconsiderations by the Appeal Board denying entitlement for a back condition, which the worker related to accidents in 1969 and/or 1976.

There was good reason to doubt correctness of the Appeal Board decision. The Appeal Board stated that the worker was not suffering from residual back disability, without addressing several reports which indicated that the worker was suffering from such a disability. In addition, the Appeal Board decision was based at least partly on delay in reporting back problems but it did not address a report which suggested the accident aggravated a preexisting condition, nor did it address possible reasons for the delay in onset of symptoms.

Leave to appeal granted. [6 pages]

WCAT Decisions Considered: 944/87L, 944/87LR

DECISION NO. 982/89 (01/02/90) Moore Higson Jago

In the course of employment (parking lots) - In the course of employment (pathways).

The worker slipped and fell while walking on a pathway leading from a parking lot to his employer's premises. The employer's premises were on the grounds of the Toronto Airport. The parking lot was owned and operated by the Ministry of Transport, which designated an area for workers of the accident employer. The accident employer allocated spaces within the area. The lot was not open to members of the public. The walkway was the most direct route to the employer's premises. Maintenance of the lot and walkway was performed by the Ministry of Transport but the accident employer could request that maintenance be performed.

Considering Tribunal decisions and Board policy, the Panel found that the worker was in the course of employment. The worker was entitled to benefits. [6 pages]

WCAT Decisions Considered: Decision No. 536 (1987), 6 W.C.A.T.R. 59; Decision Nos. 1226/87, 148/88
Board Directives and Guidelines: Claims Adjudication Branch Procedures Manual, Document no. 33-05-02; Claims Services Division Manual, s.3(1), p.47, Directive 21

DECISION NO. 1010/87 (01/02/90) Bigras Higson Preston

Psychotraumatic disability.

A plasterer suffered a back injury while lifting a heavy pail in November 1981. In June 1983, he was awarded a 15% pension.

The Panel found that the worker also suffered a neck injury in the accident, considering early reporting and continuity of symptoms. The condition had reached maximal medical rehabilitation by June 1983. The worker was entitled to a pension for the neck disability retroactive to that date.

The worker was not entitled to benefits for a psychological condition. The worker's depression was related to reduced self-worthiness when his wife and family left him and to the phasing out of his trade as a plasterer. The accident was not a significant contributing factor.

The worker's physical condition had reached maximal medical rehabilitation by June 1983. His total disability after that date was caused by the non-compensable psychological condition. The worker was not entitled to further temporary benefits. [15 pages]

WCAT Decisions Considered: Decision No. 915 (1987), 7 W.C.A.T.R. 1

Board Directives and Guidelines: Claims Adjudication Branch Procedure Manual, Document no. 33-21-01; Claims Services Division Manual, s.71(3), p.207, Directive 22

DECISION NO. 903/89 (01/02/90) Bigras Heard Jago

Accident (occurrence) - Delay (treatment).

A truck driver claimed he suffered a back injury on July 19, 1987, while fixing his truck in Texas. He continued to work until the end of July and first sought treatment in early August.

The worker was not entitled to benefits considering inconsistencies in the worker's evidence, delay in seeking treatment, delay in reporting the injury and medical reports that did not indicate any work-relatedness. [6 pages]

DECISION NO. 260/89 (01/02/90) Bigras McCombie Apsey

Withdrawal (of appeal).

The appeal by the worker and cross-appeal by the employer were withdrawn. [3 pages]

WCAT Decisions Considered: 260/89

DECISION NO. 49/90 (02/02/90) Carlan Acheson Clarke

Access to worker file, s.77 - Procedure (absent parties).

The worker did not attend the hearing of his s.77 appeal. There was no explanation for his absence. The Panel proceeded on the basis of the written submissions made by the worker in his letter of appeal. Access to the worker's file was granted to the employer. [3 pages]

DECISION NO. 832/89 (05/02/90) Carlan Fox Ronson

Access to worker file, s.77 (issue in dispute) (relevance) (new information) - Procedure (absent parties).

The employer appealed a decision denying access to medical reports that became available to the WCB after the decision regarding allowance of the claim had been made by the Decision Review Branch.

The issue in dispute was whether a lay-off was caused by a preexisting non-compensable back condition. The employer had received documents for the period following the lay-off. The documents in question related to the period prior to the lay-off. Although the Board may not have had access to these records when it granted entitlement, they were relevant.

Access to the worker's file was granted to the employer, except for irrelevant documents which did not relate to the back condition.

In a preliminary matter, the Panel decided how to proceed in the absence of the worker, who may have not received proper notice of the hearing. The Panel heard the employer's submissions, provided a copy of the transcript to the worker and accepted written submissions from the worker. [4 pages]

DECISION NO. 715/89 (05/02/90) Starkman McCombie Preston

Continuity (of treatment) - Disc (protruding).

The worker suffered a low back strain in January 1975. The worker was not entitled to benefits for surgery in 1979 for a prolapsed disc. The Panel found that the 1975 accident was relatively minor and had resolved by 1976. There was virtually no continuity of treatment of complaint. Medical opinion obtained by the Panel indicated that a prolapsed disc caused by an accident would occur shortly after the accident in most cases. [7 pages]

DECISION NO. 979/89 (05/02/90) Hartman Robillard Jago

Continuing entitlement.

The worker suffered a minor back strain in June 1977 and received benefits until September 1977. The worker was not entitled to further benefits. The degenerative condition in the worker's back was not caused or aggravated by the compensable accident. [7 pages]

DECISION NO. 827/89 (06/02/90) Signoroni McCombie Jago

Commutation (reversibility).

The worker appealed a decision denying the reversibility of his pension. The worker suffered an accident in 1948, resulting in the amputation of several fingers, for which he was awarded a 15% pension. The worker routinely asked for cash advances due to extreme financial circumstances. By 1962, the pension was fully commuted. In 1976, the pension was increased to 29.5% and in 1982, it was increased to 33%. In 1987, it was found that the worker's earnings basis had been calculated incorrectly and that monthly payments should have been about \$9 more than he received initially.

There was no indication that the commutation would not have been required if the earnings basis had been calculated properly. The worker submitted that the Board did not apply rehabilitation considerations when

granting the commutations. However, the Panel found that, at the time the commutations were granted, rehabilitation considerations had not acquired their current significance.

The appeal was dismissed. [7 pages]

WCAT Decisions Considered: 831

DECISION NO. 28/90 (06/02/90) Moore Robillard Nipshagen

Access to worker file, s.77.

Access to the worker's file was granted to the employer. [3 pages]

DECISION NO. 27/90L (06/02/90) Moore Robillard Nipshagen

Leave to appeal (good reason to doubt correctness) (consideration of evidence).

The Appeal Board denied a wage loss supplement and a pension. There was good reason to doubt correctness of the Appeal Board decision. The Appeal Board rejected, without adequate reasons, supportive evidence that the worker requested a job transfer for medical reasons and that there was a relationship between the compensable accident and the worker's ongoing disability.

Leave to appeal granted. [6 pages]

DECISION NO. 794/89 (06/02/90) Signoroni Higson Jago

Vibrations (tools) - White finger disease.

The worker used vibratory tools continuously from 1955 to 1966 and intermittently from then to 1983. In 1983, he was diagnosed as suffering from white hand syndrome. Although Board guidelines require two years of continuous exposure immediately preceding the onset of the disability, the Panel found that the worker was entitled to benefits, considering individual susceptibility. [4 pages]

Board Directives and Guidelines: Claims Adjudication Branch Procedures Manual, Document no. 33-13-09

DECISION NO. 1051/89 (06/02/90) Bigras Drennan Meslin

Temporary disability (beyond pension level) - Suitable employment - Rehabilitation, vocational (programme not offered by Board).

The worker suffered a back injury in 1978, for which he was awarded a 20% pension. After recovering from a non-compensable condition in August 1986, the Board granted 50% temporary partial disability benefits until October 1987, when the pension was increased to 30%.

The worker was disabled beyond his pension level from August 1986 to October 1987. On the evidence, he was not capable of performing the modified work that was offered by the accident employer. He was not

capable of obtaining other modified work without rehabilitation and retraining from the Board. However, the Board did not offer any rehabilitation services, since it felt that the worker considered himself totally disabled.

The worker was entitled to full temporary benefits from August 1986 to October 1987. [7 pages]

DECISION NO. 17/8912 (06/02/90) Moore Klym Seguin

Apportionment (standard of proof) - Transfer of costs - Negligence (res ipsa loquitur).

The accident employer appealed a decision of the Hearings Officer denying a transfer of costs of an accident to another employer. A worker was injured when a piece of wood fell from the top of a crane. The wood was part of a platform built and left in place by the installer of the crane. It was used during erection and dismantling of the crane but not during operation of the crane. The piece of wood fell about six months after installation.

Section 8(9) requires a determination of negligence of the second employer. In many cases, in order to determine of negligence of the second employer it is necessary to consider the actions of the second employer in relation to the actions of the accident employer.

Apportionment is an essential element of s.8(9). There was no requirement of clear or exclusive negligence on the part of the second employer, as required by Decision No. 716/87. The standard in determining liability under s.8(9) was essentially a balance of probabilities. The generally accepted principles of negligence law would apply.

The accident employer alleged negligence either by leaving the platform on the crane or by an undetermined failure on the part of the installer to attach the platform securely. The Panel found that it was not negligent to leave the platform in place since this was not unreasonable if done safely. Regarding installation, the Panel noted that the accident employer was, in effect, claiming *res ipsa loquitur*. Since *res ipsa loquitur* had not been raised specifically, and since much of the argument in the case was based on application of the standard in Decision No. 716/87, the Panel allowed further written submissions, after which a final decision would be issued. [11 pages]

WCAT Decisions Considered: Decision No. 716/87 (1987), 6 W.C.A.T.R. 242; Decision No. 586/89
Cases Considered: Decision No. 114 (1975), 2 B.C.W.C.R. 85; Kirk et al. v. McLaughlin Coal & Supplies Ltd., [1968] 1 O.R. 311; Muirhead v. International Coal Mining Co. (1914), 16 D.L.R. 450; Paquette v. Labelle (1981), 33 O.R. (2d) 425

DECISION NO. 901/89 (06/02/90) Bigras Heard Jago

Continuity (of symptoms) (life disruption) - Continuity (of treatment) - Continuity (of complaint).

A police officer injured his lower back in December 1966. He did not lose any time from work. In July 1974, he suffered a severe onset of pain at home and, in August 1974, he underwent surgery. The worker appealed a decision of the Hearings Officer denying entitlement for the disability subsequent to 1974.

The Panel considered continuity, based on factors such as medical treatment, disruption of daily life activities, work history, complaint and medical opinion.

Aside from chiropractic treatment in December 1966, there was no medical treatment until 1974. There was some evidence of restriction of activity in 1967 when the worker had difficulty helping his family move but there was very little evidence of other disruption. Eight police officers testified of continuing complaint. However, it could not be determined that they were referring to the period prior to the early 1970s. A neurosurgeon stated that the accident and 1974 disability could be related if there were

intermittent problems and acute episodes in the intervening period. However, there was no lost time until 1972 and no medical treatment until 1974.

On the evidence, the appeal was dismissed. [13 pages]

DECISION NO. 21/89 (06/02/90) Faubert Drennan Seguin

Strains and sprains (cervical).

The worker was struck on the right side of the top of his head by a spray can which fell from a few hundred feet above him. The worker was granted a 10% pension for a postural vertigo disability, but was denied benefits for neck pain on the basis that it was due to degenerative disc disease.

There was evidence that the mechanics of the injury could have caused a cervical strain and that the symptoms complained of were not compatible with mild degenerative disc disease. The worker's symptoms had remained consistent throughout the history of the claim which arose in 1981. The worker was entitled to benefits for an injury to his cervical spine. His high posterior neck pain resulted from a cervical strain which was caused by a hyperextension injury at the time of the work accident. [8 pages]

DECISION NO. 481/89L (06/02/90) Faubert McCombie Seguin

Leave to appeal (substantial new evidence) (subsequent Board decision) - Leave to appeal (good reason to doubt correctness) (evidence to support Appeal Board conclusion).

The worker sought leave to appeal a decision of the Appeal Board which awarded him only 50% temporary partial benefits from March 1976 to March 1977. The worker was subsequently awarded a 15% lump sum award in recognition of psychiatric entitlement. The worker had punctured his palm in April 1975. The wound had apparently healed, but he was unable to return to work. Functional overlay was observed as early as September 1975 and the worker received psychiatric treatment. The Appeal Board apparently made its decision solely on the basis of a psychogenic condition, despite the discussion of the diagnosis of reflex sympathetic dystrophy among treating physicians.

As a result of treatment received by the worker subsequent to the Appeal Board decision, an Appeals Adjudicator determined in 1984 that the worker suffered from a residual organic disability diagnosed as reflex sympathetic dystrophy. A rating committee then recommended a 10% pension for the psychological component of the worker's disability and a 25% rating for his organic disability.

The subsequent treatment and the Appeals Adjudicator's acceptance of the resulting diagnosis of reflex sympathetic dystrophy, did not constitute substantial new evidence. That diagnosis had clearly been before the Appeal Board. The subsequent treatment did not add appreciably to the understanding of the worker's disability. Further medical reports questioned the accuracy of the diagnosis and the contribution of non-organic factors was always acknowledged.

The real issue before the Appeal Board was not the exact diagnosis, but whether the worker was partially or totally disabled during the period in question. As there was sufficient evidence to find that the worker was only partially disabled at that time, there was no good reason to doubt the correctness of the Appeal Board decision. Leave to appeal denied. [10 pages]

WCAT Decisions Considered: Decision No. 64 (1986), 2 W.C.A.T.R. 19; Decision No. 131 (1986), 2 W.C.A.T.R. 77; Decision No. 466L (1987), 5 W.C.A.T.R. 57; Decision Nos. 704/88L, 865/88L

DECISION NO. 996/89 (08/02/90) Starkman Heard Preston

Supplements, temporary (wage loss) (period of adjustment).

A vehicle service attendant suffered a compensable shoulder injury, for which he was awarded a 10% pension. In January 1988, he returned to modified work with the accident employer as a parking cashier, at reduced wages. He was awarded a wage loss supplement from January 1988 to August 1988. The worker appealed a decision of the Hearings Officer denying the supplement beyond August 1988.

The seven months for which the worker received the supplement was not a sufficient period of adjustment to lower wages, considering: the 40% reduction in wages; the worker was 55 years old with a grade 8 education; the worker was a long time employee who would receive various seniority benefits if he continued to work with the employer.

The Board granted the worker a supplement under the transitional provisions in s.135 of the Act, commencing July 26, 1989. The Panel granted a temporary supplement under s.45(5) of the pre-1989 Act until July 25, 1989. The appeal was allowed. [10 pages]

Board Directives and Guidelines: Policy of Supplementary Benefits under Section 45(5) of the Act, Board Minute #1(a), November 16, 1987, p.52

DECISION NO. 908/89 (08/02/90) Starkman Lebert Seguin

In the course of employment (proceeding to and from work) (employer's vehicle) - Time limits (civil action) - Overpayment - Administrative Funds (transfer of costs).

The worker's dependants appealed a decision of the Hearings Officer denying entitlement for the worker's fatal accident. The worker worked at a remote mining site and stayed in a bunkhouse provided by the employer. The employer did not provide transportation to the mine site and did not remunerate for travel. Since the worker's drivers licence was suspended, he asked the job superintendent for a ride home and a ride back to the mine the following week. The superintendent used a company vehicle. On the ride back to the mine, the worker was killed in a motor vehicle accident.

The Panel suggested that Board policy, which extends the course of employment to proceeding to work in a conveyance under the control and supervision of the employer, does not adequately reflect the myriad of circumstances which must be considered. Rather than looking at a list of factors, the Panel suggested considering whether, prior to the accident, the worker and the employer would have thought that the worker was in the course of employment while being transported to the job site. On the evidence, the worker was not in the course of employment.

Initially, the Board granted benefits. It was not until three years after the accident that the Hearings Officer denied entitlement. The Panel noted that the limitation period for bringing a civil action may have passed. If the dependants bring a civil action but are unsuccessful in extending the time limits, they could apply to the Tribunal to reconsider. The Tribunal would then have to consider the scope of its remedial authority and its equitable jurisdiction, specifically regarding detrimental reliance.

The dependants may have received some benefits since the claim was allowed initially. The Panel recommended that the Board not collect such overpayment and that it transfer the costs to the Administrative Fund. [13 pages]

WCAT Decisions Considered: Decision No. 215 (1987), 4 W.C.A.T.R. 105; Decision No. 372 (1987), 4 W.C.A.T.R. 154; Decision Nos. 404, 436, 228/87, 338/87

Other Statutes Considered: Family Law Act, 1986, S.O. 1986 c.4, s.2(8)

Board Directives and Guidelines: Claims Adjudication Branch Procedures Manual, Document nos. 33-14-01; 33-14-03

Cases Considered: Basarsky v. Quinlan (1971), 24 D.L.R. (3d) 720; Deaville v. Boegeman (1984), 48 O.R. (2d) 725; Gatterbauer v. Ballast Holdings Ltd. et al. (1986), 55 O.R. (2d) 91; Macauley v. Anderson (1987), 59 O.R. (2d) 295; Moffett et al. v. Farnsworth et al. (1984), 47 O.R. (2d) 620; Nancollas v. Insurance Officer, [1985] 1 All E.R. 883

DECISION NO. 957/89 (08/02/90) Signoroni Higson Meslin

Temporary partial disability.

The worker suffered a back injury in June 1984. On the evidence the worker was not totally disabled in the period from April 1985 to April 1986. [5 pages]

DECISION NO. 787/89 (08/02/90) Starkman McCombie Meslin

Continuity (of treatment).

The worker suffered a low back strain in January 1971. The Panel found that the worker was not entitled to further benefits, considering the medical reports and lack of continuity of treatment and complaint from 1972 to 1980.

At the request of the Panel, the Tribunal Counsel Office wrote to the worker's doctor and requested answers to certain questions. The worker objected to the answer regarding when the doctor first treated the worker. The Panel refused the worker's request to write again to the doctor. The doctor had answered in an honest and straightforward manner after reviewing his notes. [10 pages]

DECISION NO. 793/89 (08/02/90) Signoroni Higson Jago

Subsequent incidents (outside work) - Aggravation (compensable injury) (white finger disease) - Significant contribution (of compensable accident to subsequent disability) - Frostbite.

The worker suffered from mild white finger disease, for which he was receiving a 5% pension. The worker suffered frostbite in a non-work-related incident, when he fell, lost consciousness and remained lying on the ground for about 30 minutes. The temperature was minus 11.5 degrees celsius and snow had recently fallen.

Medical evidence indicated that residual vasospastic problems from the white finger disease would put the worker at greater risk than the average person. The worker was a smoker, which also affects circulation. In addition, an unconscious person would be more susceptible to frostbite due to circulatory changes.

The circumstances of the non-compensable incident were the major catastrophic event leading to the frostbite injury. Considering the incident and the worker's history, the Panel found that the white finger disease was not a significant contributing factor. The appeal was dismissed. [13 pages]

WCAT Decisions Considered: Decision No. 280 (1987), 6 W.C.A.T.R. 27

DECISION NO. 10/90 (08/02/90) Starkman Robillard Apsey*Disablement (repetitive work) - Board Directives and Guidelines (disablement).*

The worker had been denied benefits by the Hearings Officer for the following reasons: though he described experiencing a sore back at work, he was uncertain as to specifically what had occurred; there were no witnesses; though he reported his injury to the team leader, he did not provide an acceptable explanation as to how the injury occurred; and the worker finished his shift and reported to work the next working day before laying off.

After reviewing various Board policy documents, the Panel determined the present Board policy to be that a disablement was an "unexpected result or an injury which is the product of a condition emerging over a long period of time". The Panel agreed that disablement is a condition that emerges over a long period of time and which is causally related to the nature of the work performed.

The worker's job of "mast jacket torquing" involved lifting 30 pound automotive parts and bolting them under the dashboard of a car. The job involved repetitive twisting and bending and his symptoms were consistent with having been caused by repetitive twisting and bending. The worker felt lower back pain while trying to extricate himself from a car. The worker complained immediately about his pain, laid off one hour after commencement of his shift the next working day and sought immediate treatment.

The worker suffered a disablement and was entitled to benefits. [7 pages]

Board Directives and Guidelines: Claims Adjudication Branch Procedures Manual, Document no. 33-01-02; Claims Services Division Manual, s.1(1)(a), p.1. Directive 2; Interpretation Bulletin, Interpretation of "personal injury by accident", "chance event", and "disablement", October 19, 1988

DECISION NO. 769/89 (08/02/90) Chapnik Beattie Seguin*Credibility - Evidence (inconsistencies) (description of accident).*

The employer's appeal, from the granting of benefits to the worker for a back injury which allegedly arose from a fall at work, was allowed. The worker's evidence contradicted that of the employer's witness, but more importantly, his own various accounts were inconsistent even with respect to the way in which the "accident" was said to have occurred.

The worker was inconsistent in relating: the timing and particulars of three alleged slipping incidents, whether his clothes got wet or dirty, whether he stood or sat down after he fell, and even whether he actually fell down in the first two incidents. The worker was not a credible witness and the Panel was unable to conclude that an accident had occurred at work. [8 pages]

WCAT Decisions Considered: Decision No. 232, 846

DECISION NO. 563/89 (08/02/90) Carlan (dissenting) Fox Meslin

Class of employer (retail mercantile business) - Class of employer (wholesale operation).

The employer objected to its classification as a wholesale operation under Rate #916, claiming that it should be classified instead as a retail mercantile business under Rate #934. The employer purchased computer accessories from wholesale and manufacturers and sold them to customers such as law firms, accounting offices, government agencies and other businesses.

The Panel found that the Board's assessment system, which is based on the end use or industry classification, had merit and rejected the employer's arguments based on a system that would consider the injury risk involved in the operation of each employer.

However, the majority of the Panel found that the Board's definition of wholesaler, which includes "a business that purchases a product and sells it to someone who uses that product in the function of their industry or operation", is fallacious. As long as the customer is the end user of the products, pays provincial sales tax, and is not buying the product with the objective of reselling it, then the seller is clearly a retailer, regardless of the quantities sold and regardless of whether the buyer is a business, government institution or an individual.

The employer in this case was thus a retailer and the Board was directed to reclassify it under Rate #934.

The Panel Chairman, dissenting, would not have interfered with the Board's classification. Consistency and equality required that all employers should be assessed on the same criteria, which should be established by the Board. The circumstances of this case did not warrant the Panel substituting its own criterion, the obligation to collect retail sales tax, in place of the Board's criteria. [9 pages]

WCAT Decisions Considered: Decision No. 131/87 (1989), 10 W.C.A.T.R. 51

Regulations Considered: Regulation 951, Schedule 1

Board Directives and Guidelines: Employer Assessment Policies Manual, Document no. 03-01-00

DECISION NO. 519/89 (12/02/90) Kenny McCombie Ronson

Chronic pain - Pensions (stacking).

The worker suffered a neck injury, for which he was awarded a 25% pension. The worker appealed a decision of the Hearings Officer denying benefits for a low back disability and denying entitlement for chronic pain.

Considering delay in onset of reported low back symptoms, the worker was not entitled to benefits for the low back condition.

As to chronic pain, it was clear from the Board chronic pain policies and guidelines that, regarding the "stacking" of ratings, the Board intended that a rating would not be made under both the chronic pain policy and the policy applicable to the organic condition for the same injury/disability. The Tribunal was indicated that it will normally look at the disability as a whole. However, this does not mean that all pension ratings before the chronic pain policy will be increased simply because there is evidence of a non-organic source for some portion of the disability. Some Board ratings may have left room to compensate to some extent for non-organic pain, because of the difficulty in determining the extent to which the pain related to non-organic factors.

In this case the Panel found that: the worker's neck disability was not inconsistent with the organic findings; the rating was within the general range which could be expected under the Rating Schedule for a neck disability with marked restriction of mobility but little or no neurological deficit; the Board did not discount the worker's rating due to non-organic factors. The real discrepancy between physical findings and

disability related to the low back, however, the low back condition was not compensable. The appeal was dismissed. [9 pages]

WCAT Decisions Considered: 638/89)

Board Directives and Guidelines: Chronic Pain Disorder Policy, Board Minute 2, July 3, 1987, p.5196;

Guidelines for the Interim Chronic Pain Disorder Policy, Board Minute 1, May 2, 1989, p.74

DECISION NO. 1023/89 (12/02/90) Faubert Lebert Jago

Aggravation (preexisting condition) (disc degeneration) - Continuity (of symptoms).

The worker suffered a neck injury in December 1979. In October 1980, while at HRC, the worker suffered a low back strain. The Board accepted the incident as compensable but denied benefits subsequent to the worker's discharge from HRC.

The worker was not entitled to further benefits for the low back condition. The sprain was minor aggravation of preexisting degenerative disc disease. The worker returned to his pre-accident state by the time of discharge from HRC. [6 pages]

Board Directives and Guidelines: Claims Adjudication Branch Procedures Manual, Document no. 33-02-20; 33-27-01

DECISION NO. 1011/89 (12/02/90) Starkman Beattie Shuel

Preexisting condition (mental condition).

The worker suffered a sudden onset of pain in her groin while lifting a box at work in July 1983. The Board denied continuing entitlement for organic and psychological problems.

The Panel found that the organic disability had resolved.

The worker had preexisting psychiatric problems. The psychiatric problems after the accident were essentially the same as prior to the accident. Considering the preexisting condition and the non-traumatic nature of the accident, the Panel found that the compensable accident was not a significant contributing factor to the psychiatric condition. Rather, it was related to the worker's family and social history and her drinking problems. [11 pages]

DECISION NO. 107/89 (13/02/90) Stewart Higson Jago

Downside risk - Evidence (inconsistencies) (description of accident) - Mental condition - Jurisdiction, Tribunal (final decision of Board).

In October 1984, the worker slipped down some stairs. He received temporary benefits for two days in October 1984, and for several other periods between January 1985 and April 1986. The worker appealed a decision of the Hearings Officer denying ongoing benefits for organic and non-organic disability subsequent to April 1986.

There was conflicting evidence regarding the accident. The Panel accepted the evidence of a co-worker over that of the worker and found that the accident was minor in nature. Considering the minor nature of the accident and the ability of the worker to return to work after two days, the worker was not entitled to ongoing benefits for organic disability. The worker also was not entitled to ongoing benefits for

non-organic disability. Medical reports relating insomnia and depression to the compensable accident were based on a longer fall than occurred and on the worker being unconscious.

The employer raised the issue of benefits prior to April 1986. This downside risk issue was raised on the first day of the hearing. The parties had opportunity to prepare additional evidence and submissions until the second day of the hearing, two months later. The Tribunal has taken a broad approach to its jurisdiction. The Panel decided that the broad characterization of the issue on appeal was ongoing disability and that the Panel had jurisdiction. In some circumstances it might be inappropriate to consider the downside risk issue but, in this case, the parties had full opportunity to obtain additional evidence and to make submissions.

The Panel found that the worker was not entitled to benefits subsequent to the initial two days off work. The matter of overpayment was remitted to the Board. [16 pages]

WCAT Decisions Considered: Decision No. 182 (1988), 10 W.C.A.T.R. 1; Decision No. 756 (1988), 6 W.C.A.T.R. 84

DECISION NO. 87/90 (13/02/90) Signoroni Jackson Jago

Medical examination (section 21) - Withdrawal (of application).

In preparation for a hearing before the Hearings Officer, the employer requested access to the worker's file. The Board limited access to the reports since only initial entitlement was in dispute. The employer then brought this s.21 application for a medical examination.

The Panel noted that the employer intended to appeal continuing entitlement if its appeal regarding initial entitlement were dismissed. If the employer appealed immediately on both initial and, alternatively, continuing entitlement, it could request access to the balance of medical reports and might not need the medical examination.

It further became apparent that the worker's refusal to attend the examination requested by the employer was based on a misunderstanding.

In the circumstances, the application was withdrawn. [5 pages]

DECISION NO. 11/90 (13/02/90) Carlan Cook Preston

Supplements, older worker - Availability for employment (job search).

The worker suffered a back injury in 1964, for which he was awarded a pension. He laid off in 1981 due to his back condition and received a temporary supplement from 1982 to 1986.

The worker was not entitled to an older worker supplement subsequent to 1986. On the evidence, it was not his age but, rather, his lack of activity and initiative in pursuing job opportunities that prevented the worker from returning to work. [6 pages]

WCAT Decisions Considered: 729/89

DECISION NO. 987/89 (13/02/90) Chapnik Cook Meslin

Pensions (assessment) (back).

The worker suffered a back injury, for which she was awarded a 15% pension, later increased to 25%. The worker was not entitled to a higher pension. The 25% pension was more than adequate in the circumstances. The worker's doctor was unfamiliar with the nature and purpose of the Rating Schedule. [7 pages]

WCAT Decisions Considered: Decision No. 915 (1987), 7 W.C.A.T.R. 1
Board Directives and Guidelines: Operational Policy Manual, Document no. 05-03-03

DECISION NO. 34/90L (13/02/90) Faubert Higson Nipshagen

Jurisdiction, Tribunal (leave to appeal).

The worker suffered a compensable injury in May 1963 and a further injury in July 1963. The Appeal Board found that the July accident was non-compensable and that the May accident did not contribute to the July accident. The Appeal Board did not decide whether the worker continued to experience disability arising out of the May accident. Accordingly, leave to appeal was not required on this issue. [5 pages]

DECISION NO. 24/90 (13/02/90) Carlan Lebert Howes

Commutation (debt liquidation) (home mortgage) - Commutation (business investment).

The Panel granted a partial commutation of the worker's pension to liquidate a mortgage. The mortgagor would not renew. There was no evidence that the worker would be able to secure a mortgage from a different source. The commutation would result in reduction of monthly payments by about \$150, which was less than would be required to secure other accommodations.

The Panel refused a partial commutation for the purchase of a backhoe which the worker intended to use to start a business. The Panel was not satisfied as to the viability of the business. [5 pages]

Board Directives and Guidelines: Guidelines for the Commutation of Pensions, Board Minute 3, March 20, 1989, p.71

DECISION NO. 629/89 (13/02/90) Carlan Robillard (dissenting) Preston

Second accident - Worker (status during medical appointment) - In the course of employment (work relatedness test) - Arising out of employment (work relatedness test).

The worker suffered a compensable head injury on September 10, 1986, and returned to work on September 29, 1986. On December 1, 1986, she went to her family doctor concerning the head injury. While returning to work after the appointment, she slipped on ice in the street and suffered a wrist injury. The Board paid for lost time to attend the doctor's appointment but denied benefits for the wrist injury.

The majority of the Panel found that the worker was not entitled to benefits for the wrist injury. The payment of benefits for attending the appointment was not determinative. There was no direct link between the wrist injury and the compensable accident. In addition, the purpose of the trip was too remote to be considered work-related, since the appointment was not for required medical treatment or at the specific direction of the Board. The trip was undertaken at the worker's initiative.

The majority concluded that the wrist injury was not a compensable consequence of the head injury and that it did not arise out of or in the course of employment.

The Worker Member, dissenting, found that the worker was on a special trip for a reason that arose out of work. She was not a member of the general public on a public street but, rather, an employee conducting work-related business. [6 pages]

DECISION NO. 658/89 (14/02/90) Moore McCombie Ronson

Aggravation (preexisting condition) (disc degeneration) (asymptomatic).

The worker suffered a neck injury in May 1978 and received benefits until March 1979. The Panel found that the worker was entitled to benefits subsequent to March 1979. The accident aggravated the preexisting but asymptomatic degenerative disc disease. Since the condition was asymptomatic at the time of the accident, there was no limitation on benefits throughout the period of temporary disability, as provided in the Board guidelines. [6 pages]

Board Directives and Guidelines: Claims Adjudication Branch Procedures Manual, Document no. 33-02-20

DECISION NO. 958/89 (14/02/90) Moore McCombie Ronson

Rehabilitation, vocational (considering self totally disabled) - Availability for employment (job search).

The worker suffered an injury in June 1983. He appealed a decision of the Appeals Adjudicator denying full benefits from November 1983 to October 1985.

The worker was temporarily partially disabled during the period in question. There were minimal organic findings. He was discharged in November 1983 from PSEM to a two month period of modified work on the basis of residual psychiatric problems and with a recommendation that his file be reviewed if he could not find work during that time. The worker considered himself totally disabled, his rehabilitation file was closed and his benefits reduced.

The discharge report made it clear that special handling of the worker's case was required. Nonetheless, his file was abruptly closed. In the circumstances, he did not fail to cooperate with rehabilitation.

Considering that his psychological condition contributed to his failure to seek employment and considering his background and limited education, the Panel found that the worker was entitled to full benefits. [9 pages]

WCAT Decisions Considered: Decision No. 9 (1986), 1 W.C.A.T.R. 23; Decision No. 121 (1986), 3 W.C.A.T.R. 81; Decision Nos. 674/87, 1007/87

DECISION NO. 83/90 (15/02/90) Onen Cook Meslin

Suitable employment - Rehabilitation, vocational (cooperation) - Impairment of earning capacity.

The worker was a coder and sorter of mail who suffered tendonitis in May 1986. In March 1988, she returned to modified work as a wicket clerk trainee. In April 1988, she laid off again.

The Panel found that the modified work involved some sorting of mail. This required repetitive use of her arm and aggravated her compensable tendonitis. The worker's modified job was quite unstructured. Yet

the worker made no attempt to modify the work to suit her disability. This constituted a failure to participate meaningfully in a programme which may well have had rehabilitative value.

The worker was entitled to 50% benefits from April 1988 until the end of May 1988 and to a pension assessment thereafter. She had an ongoing impairment of earning capacity since, although she had no ongoing pain, she would aggravate the underlying condition by certain movements. [9 pages]

DECISION NO. 999/89 (16/02/90) Signoroni Lebert Jago

Continuing entitlement - Aggravation (preexisting condition) (spondylolisthesis).

The worker suffered a back strain in September 1969 and was off work until December 1969. The worker was not entitled to benefits for a lay-off in 1981. The 1969 accident was an aggravation of preexisting symptomatic spondylolisthesis with spondylosis and disc degeneration. The disability in 1981 was a natural progression of the underlying condition. [6 pages]

DECISION NO. 305/89 (16/02/90) Bigras Heard Nipshagen

Temporary disability (beyond pension level) - Earnings (basis) (recurrences).

The worker suffered a compensable back injury in 1975, for which he was awarded a 20% pension. He experienced a number of recurrences, including a recurrence in December 1986. After this recurrence, he received temporary benefits until April 1987.

The worker was not entitled to temporary benefits subsequent to April 1987. On the evidence, he was not disabled beyond his pension level after that date.

The worker also submitted that his benefits subsequent to December 1986 should be calculated on the basis of earnings prior to a recurrence in 1978, rather than on the basis of earnings prior to the 1986 recurrence. The Panel noted that s.40 (in s.134) of the Act provides that benefits shall be calculated only on the basis of earnings at the date of the accident or at the date of the most recent employment. The worker's earnings at the time of the recurrence in 1986 were higher than at the time of the accident. The appeal was dismissed. [8 pages]

DECISION NO. 988/89 (16/02/90) Chapnik Cook Meslin

Continuity (of treatment) - Benefit of the doubt.

The worker suffered an injury to his nose in 1978 when a cable struck the worker's hard hat, forcing it down onto his safety glasses. A laceration to the bridge of the nose was diagnosed. In May 1988, the worker

underwent nasal surgery, including a nasal septoplasty and limited rhinoplasty. The worker appealed a decision of the Hearings Officer denying entitlement for the nasal surgery.

On the evidence, the Panel found that a bony structure arose on the bridge of the worker's nose after the accident. This only started causing problems in 1987 after the worker had to start wearing safety glasses all the time. Applying the benefit of the doubt, the Panel found that the worker was entitled to benefits for the rhinoplasty. However, the nasal septoplasty was not related to the compensable accident. [6 pages]

DECISION NO. 396/89 (16/02/90) Faubert Jackson Seguin

Aggravation (preexisting condition) - Recurrences (compensable injury).

The worker, who had a preexisting back condition, suffered compensable back injuries in February 1977 and August 1983. The worker appealed denial of benefits subsequent to May 1984.

There was some continuity of symptoms from 1977 to 1983. These symptoms were not sufficient to disable him during that period. The Panel found that the 1977 accident was not a significant contributing factor to the 1983 disability. After the 1983 accident, the worker's condition changed. He was not able to establish a stable pattern of employment and the low back pain never really resolved. The worker was entitled to benefits subsequent to May 1984 for periods of recurrence of the back disability on the basis that they arose out of the 1983 accident. The appeal was allowed. [10 pages]

WCAT Decisions Considered: Decision No. 177 (1986), 3 W.C.A.T.R. 99; Decision No. 288 (1987), 4 W.C.A.T.R. 127 Board Directives and Guidelines: Claims Adjudication Branch Procedures Manual, Document no. 33-02-20

DECISION NO. 503/89 (16/02/90) Faubert Robillard Ronson

Temporary disability (beyond pension level).

The worker suffered a back injury, for which he was receiving a 25% pension. The Panel accepted the evidence of the worker's treating doctor and found that the worker was entitled to temporary total disability benefits from January to June 1985, when he was experiencing a period of acute back pain which rendered him totally disabled. [5 pages]

DECISION NO. 47/90 (16/02/90) Bigras Jackson Preston

Psychotraumatic disability - Hemorrhoids.

The worker injured his back in a lifting incident at work on April 30, 1984 and he was receiving a 10% pension for the resulting disability. He claimed to have also injured his back on April 27, 1984 and that this prior injury was the cause of his hemorrhoid condition. The worker claimed that these injuries also resulted in a psychotraumatic disability.

It is possible for haemorrhoids to be caused by exertion. However, the worker did not complain of any related problems until April 1986. Given that the worker was not reluctant to complain to his doctors about other problems and that the condition was serious enough to require surgery in October 1986, a causal relationship between the work accidents and the hemorrhoid condition was not established.

Though there was a diagnosis of "accident neurosis", the Panel found that this was not a direct reference to the accident itself, but rather an indirect one involving the consequences of the accident. Depressive and emotional reaction derived from the worker's situation subsequent to the accident were noted by a social worker and a psychiatrist. If such sequelae were severe enough to cause a higher degree of disability they would be compensable. However, in this case, the worker's mood reactions resulted from his obsession that he was not being treated fairly by doctors of the Board and from his desire to obtain higher benefits from the Board.

Unjustified complaints against the level of compensation received and unproven opinions that doctors were making incorrect diagnoses were not reasons to grant compensation. Moreover, the worker's irritability, anger and depressive moods were not psychiatric disorders. There was no compensable psychiatric disability.

The Panel also found that there was no reason to increase the 10% pension rating, that the worker disqualified himself from entitlement to a supplement by failing to look for work or to cooperate with vocational rehabilitation and that the worker's disability had not deteriorated beyond his pension level. [15 pages]

WCAT Decisions Considered: Decision No. 915 (1987), 7 W.C.A.T.R. 1

DECISION NO. 335/89 (19/02/90) Ellis Klym Nipshagen

Jurisdiction, Board (over own process) - Issue setting - Referral to Board - Exposure (isocyanate fumes) - Bronchitis.

The worker claimed benefits at the Tribunal for chronic bronchitis related to long term exposure to isocyanate fumes. He also stated that he suffered headaches, nausea and stomach upset from exposure to unknown chemical fumes on January 4, 1984, and claimed benefits for one day when he went to his doctor.

The worker had made a claim for the one day only and this had been adjudicated by Claims Adjudication. At the Claims Review Branch, the Board decided that it was necessary to treat the worker's claim as though it included a claim for chronic bronchitis from long term exposure to isocyanate. The Hearings Officer also denied entitlement for both the long term exposure and the one-day exposure.

The Board, in accordance with its powers to control its own process, is entitled to deal with any issue that it considers necessary in disposing of a claim in a fashion that is appropriate and fair from the perspective not only of the worker but also of the employer and the system. However, the Board's jurisdiction must be limited to adjudication of issues that are reasonably related to the worker's claim.

After a detailed review of the evidence, the Panel found that the Claims Review Branch adjudicated a claim that the worker was not making and that was not reasonably related to the claim the worker was making. This was beyond the Board's jurisdiction.

The appeal to the Hearings Officer still only related to the one-day claim. However, in testimony, the worker did finally allege that his lung condition was attributable to exposure. This was sufficient to give the Hearings Officer jurisdiction.

The Panel then considered its own issue-agenda setting powers. In the circumstances of the case, the Board did not investigate fully the long term exposure issue. In technically-sophisticated industrial disease claims, it is especially important to have full benefit of the Board's expertise and experience. The Panel referred the matter back to the Board to determine benefits for chronic bronchitis, without prejudice to the right to appeal.

On the evidence, the worker was entitled to benefits for the one day related to the exposure to unknown fumes. [20 pages]

WCAT Decisions Considered: Decision No. 206A (1988), 9 W.C.A.T.R. 4; Pension Assessment Appeals Leading Case Interim Report (1986), 7 W.C.A.T.R. 365

DECISION NO. 88/89 (19/02/90) Carlan McCombie (dissenting) Seguin*Presumptions (section 3) - Heart attack.*

The worker's widow appealed a decision of the Hearings Officer denying entitlement for the worker's death from a heart attack at work in 1984. The worker's job duties were modified in 1978 or 1979 to accommodate an underlying heart condition. The modified work involved distribution of rolls of towelling. There was some evidence that the worker was instructed not to lift the slings containing the rolls. However, evidence indicated that he did lift and carry the slings. The worker suffered the heart attack while lifting.

The worker had suffered two previous heart attacks while was not engaged in physical activities.

In Decision No. 42/89, the Panel found that the presumption requires the question of work relatedness to be put in the negative and that, in the face of unresolvable substantial possibilities of employment-relatedness, it would not be possible for a panel to be convinced that the injury did not arise out of employment.

In this case, the majority of the Panel found that the disease process was so advanced that the work activity was insignificant. Even applying the presumption clause, the non-work-relatedness was sufficiently strong to deny entitlement. The lifting of the sling was an activity to which the worker was accustomed and which was not strenuous.

Decisions like Decision No. 42/89 dealt with cases where there was little known about the workplace accident or the underlying condition. In this case, there was not an unresolvable substantial possibility, within the meaning of Decision No. 42/89. The appeal was dismissed.

The Worker Member, dissenting, found that the heart attack was an accident which occurred in the course of employment, that the presumption clause applied, that it had not been shown that work was not a significant contributing factor and that the lifting of the sling established a theory of employment relatedness. [12 pages]

WCAT Decisions Considered: 42/89

Cases Considered: Clover, Clayton and Co. Ltd. v. Hughes, [1910] A.C. 242; Voisin v. Royal Insurance (1988), 53 D.L.R. (4th) 299

DECISION NO. 490/89 (19/02/90) Faubert Fox Preston*Accident (occurrence) - Continuity (of treatment).*

The worker was off work for five days after November 30, 1981. The Panel found that the worker did suffer an injury at work on that date despite the absence of a record in the employer's log book, which it was the employer's practice to maintain. The worker did seek medical attention on that day for an injury which he reported to have been sustained at work.

After travelling out of the country, the worker returned to work in January 1982. In the year 1982, he was seen for back pain in July, but the only treatment that he received was for arm neuralgia in August and September. The worker was treated for low back pain on three occasions in October and November 1983. In October 1985 the worker was admitted to hospital and in January 1986 a lumbar laminectomy and discotomy were performed. There was a large disc prolapse and the contents of the disc were consistent with degenerative disc material.

The worker was not entitled to benefits subsequent to August 1985. The worker suffered from degenerative disc disease prior to November 1981. He had recovered from his work injury by the time of his return to work in January 1982. The history of his treatment after that date did not show continuity of complaint or medical attention. [13 pages]

DECISION NO. 1049/89 (20/02/90) Lax Beattie Jago*Medical examination (section 21).*

The worker suffered a right knee injury in 1974 for which he was awarded a 15% pension.

The worker was ordered to attend a medical examination by an orthopaedic surgeon selected by the employer. There were valid compensation goals of the pension level and degree of SIEF relief. The worker had undergone three surgical procedures. He had a number of other health problems which may or may not have contributed to the knee disability. The worker had not been examined since 1987 when he was re-assessed for the pension. [5 pages]

WCAT Decisions Considered: Decision No. 174 (1986), 2 W.C.A.T.R. 96; Decision No. 434 (1987), 4 W.C.A.T.R. 183; Decision No. 915 (1987), 7 W.C.A.T.R. 1; Decision Nos. 19/87, 22/87, 242/88

DECISION NO. 86/90 (20/02/90) Starkman Fox Ronson*Access to worker file, s.77.*

Access to the worker's file was granted to the employer. [3 pages].

DECISION NO. 88/90 (20/02/90) Starkman Fox Ronson*Access to worker file, s.77.*

Access to the worker's file was granted to the employer. [3 pages].

DECISION NO. 89/90 (20/02/90) Starkman Fox Ronson*Access to worker file, s.77.*

Access to the worker's file was granted to the employer, except for portions of one report which were not relevant. [3 pages].

DECISION NO. 847/89 (20/02/90) McGrath Higson Jago*Hearing (witness called by Panel) - Accident (occurrence).*

The worker appealed a decision of the Hearings Officer denying entitlement for a low back condition.

A witness had been subpoenaed by the worker. Just before the hearing, the worker decided not to question her. The Panel decided to have her testify because there were questions it wished to ask her.

The evidence did not support the worker's claim that an accident occurred at work, considering delay in reporting the injury and the less than credible evidence of the worker. The appeal was dismissed. [7 pages]

DECISION NO. 652/89 (20/02/90) Carlan Beattie Preston*Rehabilitation, vocational (cooperation).*

The worker suffered a low back strain in January 1987. He received full benefits until October 1987 when he was discharged from HRC to modified work. Full benefits were reinstated in March 1988 when the worker advised that he was prepared to look for work.

The worker was not entitled to full benefits from October 1987 to March 1988. He had received intensive counselling on how to look for work. In the month after discharge from HRC, the Board pushed the worker to look aggressively for work but he resisted. [6 pages]

DECISION NO. 1033/89 (20/02/90) Marafioti Robillard Apsey*Delay (onset of symptoms) - Second accident - Recurrences (compensable injury) - Procedure (witness fees).*

The worker suffered a low back injury in November 1976 when he fell from a roof. On the evidence, the worker was not entitled to continuing benefits for a neck condition. There was no mention of neck problems until a report in December 1976. A subsequent report by the same doctor did not mention neck problems. The first objective medical evidence of neck problems appeared in 1982.

An accident in November 1981, in which the worker slipped down an embankment, was a new accident and not a recurrence of the 1976 accident considering lack of medical attention for two years and ability to carry on normal activities prior to the 1981 accident.

The Panel heard oral evidence from the worker's family doctor. The Panel found that the doctor should be paid as an expert witness since the doctor's evidence was necessary and important, particularly on the explanation of the medical etiology of the worker's complaints. [6 pages]

DECISION NO. 18/90 (21/02/90) Carlan Fox Meslin*Disablement (repetitive work).*

The worker was entitled to benefits for a shoulder and arm condition which resulted from repetitive work carding buttons. [7 pages]

DECISION NO. 114/90I (21/02/90) Strachan Higson Shuel*Adjournment (referral to Board).*

The hearing was adjourned and the case referred back to the Board for a chronic pain assessment, as contemplated by the Hearings Officer decision. [3 pages]

DECISION NO. 568/89 (22/02/90) McIntosh-Janis Cook Preston*Hearing loss - Presbycusis.*

The worker appealed a decision of the Hearings Officer denying entitlement for hearing loss.

The worker worked for one employer from 1964 to 1966. He was exposed to noise levels up to 79 decibels. This was not sufficiently close to the Board guidelines of 90 decibels.

From 1971 to 1975, the worker was exposed to noise levels at another employer from 83 to 92 decibels. In 1975, ear plugs were introduced, which significantly lowered the noise level. In 1979, the worker retired. The Panel found that the worker was entitled to benefits for exposure at the second employer. Medical reports supported entitlement. The reports also noted the possible effect of ageing on the worker's hearing loss but the Panel found that there was little, if any, deterioration in hearing after 1975. [7 pages]

DECISION NO. 216/87LR (22/02/90) Stewart McCombie Jago*Reconsideration (new evidence).*

The worker applied to reconsider Decision No. 216/87L, in which leave to appeal was denied from a decision denying entitlement for an accident.

The worker's family doctor wrote a letter stating that he had a telephone conversation with a person who stated she was the employee health physician at the hospital where the worker was employed. In that conversation, the health physician indicated that the employer was opposing the claim for budgetary reasons.

The worker's doctor wrote concerning a conversation which took place six to nine years earlier and of which he made no notes at the time. The health physician adamantly denied that such a conversation took place. The worker's doctor admitted that the health physician was not the person with whom he spoke. It was most improbable that someone else falsely represented herself as the health physician. The Panel concluded that the family doctor's recollection must have arisen from a misunderstanding on his part.

The application was dismissed. [6 pages]

WCAT Decisions Considered: 72R2, 216/87L

DECISION NO. 475/88 (22/02/90) Moore Rao Apsey*Supplements, temporary (calculation) - Supplements, temporary (rehabilitative purpose) - Impairment of earning capacity.*

A mechanic suffered a knee injury in 1967, for which he was awarded a 35% pension, and a hand injury in 1975, for which he was awarded a 5% pension. The worker appealed a decision of the Appeal Board denying a temporary supplement from July 1983 to April 1985.

The worker's average earnings prior to the 1967 accident were not indicated in the file. The Board set the figure at \$99 for the purposes of the claim. The average weekly earnings prior to the second accident were \$360. From 1983 to 1985, the worker worked part time as a bus driver, with average weekly earnings of approximately \$160.

In considering pre-accident earning capacity, the relevant injury is the injury which contributed most significantly to the alleged impairment of earning capacity. In this case, the worker was able to continue working as a mechanic with no wage loss after the 1967 knee injury. It was after the hand injury in 1975

that the worker's capacity to work began to deteriorate. Although the hand injury attracted only a 5% pension, the impairment of earning capacity should be determined by comparing post-accident earning capacity with the earning capacity prior to the 1975 accident.

The worker's impairment of earning capacity was significantly greater than usual. There was a rehabilitative purpose to payment of a wage loss supplement to the worker since, although he had limited employment prospects, the part-time work enabled him to keep active and to take advantage of full-time or charter jobs of which he became aware.

The Panel did not consider a supplement subsequent to April 1985, since there were statutory changes affecting calculation of supplements and since the Appeal Board ceased to exist and would never have had jurisdiction over the subsequent period. [8 pages]

WCAT Decisions Considered: Decision No. 124/88 (1988), 9 W.C.A.T.R. 231; Decision No. 349/88

DECISION NO. 850/89L (22/02/90) Marcotte Lebert Preston

Leave to appeal (good reason to doubt correctness) (consideration of evidence).

The Appeal Board denied continuing benefits for an arm disability, relying on reports of Board doctors and finding that the worker's continuing disability was not organic in nature. The Panel found that the Board erred in finding there was no organic disability since one of the reports noted neurological deficits that caused the left arm to give way.

Leave to appeal was granted. [5 pages]

DECISION NO. 74/90 (22/02/90) Onen Robillard Apsey

Commutation (vehicle purchase).

The worker appealed a decision of the Hearings Officer denying commutation of his pension, which he wanted for the purpose of purchasing an automobile in order to make himself more mobile and to undertake part-time delivery work.

The worker's current budget was balanced. He paid about \$75 per month for taxis. However, commutation of his pension would reduce monthly income by \$125. The Panel was not satisfied that the worker had sufficiently investigated the costs of operating an automobile. In addition, if he were to lose the vehicle through accident or deterioration, he would be financially worse off than now. The appeal was dismissed. [5 pages]

DECISION NO. 308/89 (22/02/90) Strachan Drennan Jago

Rehabilitation, vocational (considering self totally disabled).

The worker suffered a cervical strain on September 24, 1985. He received temporary total benefits until December 19, 1985, less time worked during that period. The worker received chiropractic treatment from September 25, 1985 to January 31, 1986.

The worker took the position, contrary to medical opinion, that he was totally disabled and made virtually no effort to seek employment until late April 1986. He took this position despite knowing that he had performed a heavier job than usual at a time when his chiropractor offered the opinion that he was

totally disabled. When the chiropractor recommended modified employment in December 1985, the worker took the position that he was totally disabled. The worker was not entitled to temporary total disability benefits subsequent to December 19, 1985. [6 pages]

DECISION NO. 78/90I (23/02/90) Moore Fox Meslin

Issue setting - Adjournment (additional medical evidence).

The Panel determined that this case required a holistic approach rather than a piecemeal approach. The broad issues were aspects of ongoing disability which were not recognized by the Board as compensable and entitlement to temporary benefits for a specific period.

The medical evidence before the Panel did not contain any comprehensive analysis of the worker's history and current status. The case was recessed for the worker to attend a pain clinic and obtain a report addressing specific concerns raised by the Panel. [5 pages]

WCAT Decisions Considered: 393/8812

DECISION NO. 39/90 (23/02/90) Bradbury Fox Jago

Penalties - Board Directives and Guidelines (penalty assessments) (homogeneous rate group) - Board Directives and Guidelines (penalty assessments) (charitable organization).

The employer appealed a decision of the Hearings Officer confirming a penalty assessment. The employer operated a home for the aged. It was a non-profit organization with charitable status operated by the county. It was the only psycho-geriatric care facility in the county.

On the evidence, the Panel was satisfied that the employer had taken steps to improve its safety measures.

Further, Board guidelines provided for suspension of assessments where the employers in a rate group were not a homogeneous group with similar risks. In this case, the employer was the only facility in its rate group that provided psycho-geriatric care. The other employers in the group benefited from the employer's enterprise by being relieved of the burden of caring for a substantial amount of people requiring chronic care.

In addition, the employer was a non-profit organization within the Board's criteria for exemption from penalty assessments.

For the above reasons, and especially the charitable status, the appeal was allowed. [8 pages]

WCAT Decisions Considered: 829/88, 94/89

Regulations Considered: Reg. 951, s.6(1)

Board Directives and Guidelines: Additional Assessments Policies and Procedures, Board Minute 6, January 14, 1975

DECISION NO. 989/89 (23/02/90) Chapnik Cook Meslin

Recurrences (compensable injury) - Disablement (strenuous work).

The worker was a nurse providing home care on a part-time basis. The worker suffered a compensable back strain in October 1983, for which she lost no time. In December 1984, she experienced a further onset of back pain.

The worker was entitled to benefits for her condition in 1984, either as a recurrence of the 1983 injury or as a disablement from the strenuous nature of her work and, in particular, from the unusually heavy workload prior to the 1984 lay off. [8 pages]

DECISION NO. 24F (23/02/90) Ellis Cook Apsey

Presumptions (section 3) (standard of proof) - Accident (definition of) - In the course of employment (residential employees) - In the course of employment (takes self out of employment) (drug abuse) - In the course of employment (takes self out of employment) (misconduct) - Misconduct - Drug abuse - Bias.

The employer appealed a decision of the Appeals Adjudicator granting benefits for an injury suffered by the worker in September 1980.

In a preliminary matter, the Panel rejected the worker's submission that there was a reasonable apprehension of bias since the Tribunal counsel for this case had gone into private practice and was retained by the Tribunal's General Counsel to continue to act at this hearing. The Panel found that: Tribunal counsel could act in a non-partisan role even though he may be acting predominantly for workers or employers; the fact that a lawyer acts for a group of clients is not evidence of a personal, partisan commitment to those clients' ideological perspective; there was no basis for the view that the Panel would be susceptible to being unduly or inappropriately influenced by his views.

The worker was a seaman who suffered serious injuries to his leg caused by lying in an unconscious state for over six off-duty hours in his own locked cabin with his leg folded under him. The worker did not recall the circumstances and there was no direct evidence to explain it.

The worker's cabin had a steel floor, covered with linoleum. The bed was 29 inches from the floor, about 10 inches higher than a normal bed. According to medical evidence, a person would not remain in a position long enough to block arteries when in normal sleep. One theory as to what may have happened to cause the injuries was that the worker lapsed into a drug-induced coma. The worker had a history of drug abuse but denied taking drugs on the day of the accident. Testing neither confirmed nor ruled out drug abuse. Another theory was that the worker suffered a spontaneous seizure, although he had no prior or subsequent history of seizure. The seizure would have caused the worker to fall out of bed the unusually long distance to the unusually hard floor, knocking him unconscious.

The issues were whether the worker suffered an injury by accident, whether the accident occurred in the course of employment, whether it arose out of the course of employment and whether the presumption clause was applicable.

The Panel approved the reasoning of Decision No. 42/89 regarding the definition of accident and found that accident means any unintended and unexpected occurrence, whether it be a cause or a result, which produces hurt or loss, and, for greater certainty, includes specifically the three concepts enumerated in s.1(1)(a): acts of others, acts of God and disablement. The board of directors of the WCB considered Decision No. 42/89 and decided not to review it pursuant to s.86n but, until a future determination of the interpretation of injury by accident, to continue to apply its interpretation reached in its review of Decision No. 72. In light of the board of directors decision not to review Decision No. 42/89, the Panel felt free to follow it in this case without restraint.

The Panel agreed with Decision No. 42/89 that the presumption in s.3(3) applies to factual issues, not legal issues. In this case, the factual relationship between employment and the injury was not known and the presumption was, therefore, relevant.

The Panel stated that arising out of employment and in the course of employment are two separate issues. In cases where this is no uncertainty about what happened, the two issues are sometime, for convenience, treated as one question. However, when the facts of employment relatedness are not known, it is necessary to recognize and treat the questions separately.

The worker was a residential employee who was subject to usual ship-board restrictions even though he was off duty at the time of the accident. The Panel found that the worker was in the course of employment.

The employer submitted that the worker took himself out of the course of employment by his personal activity of taking drugs. The Panel stated that in the course of employment relates only to where workers were at the time of the injury and whether they were there because of their employment. If the injury was caused by a drug-induced coma, the injury would not have arisen out of employment. The use of drugs would not have taken the worker out of the course of employment. This would apply to misconduct, as well. With misconduct, the idea that a worker could take himself out of employment, was also inconsistent with s.3(7).

The Panel noted that this interpretation, if applied to s.8(9), could result in the barring of civil actions if the other worker was at work at the time of the accident, even though the injury resulted from the serious misconduct of that other worker. This result would not be so inconsistent with the purposes of the Act that it could not have been intended. In addition, it was also possible that the phrase did not have to be interpreted the same way in s.8(9) as in s.3(1), since s.8(9) was dealing with civil liability and may have been using a concept familiar to the master and servant common law regarding a master's liability for damages caused by an employee's negligence.

Since the worker was in the course of employment, the presumption clause was applicable. In Decision No. 42/89, it was found that the presumption could not be rebutted if, first, on the balance of probabilities the employment was not a significant causative factor and, secondly, there were no unresolvable significant theories of employment-relatedness.

This created a higher standard of proof than the balance of probabilities. This stricter standard could be expressed as the standard in criminal law cases of beyond a reasonable doubt. The Panel interpreted s.3(3) as saying that, where the accident occurred in the course of employment, unless the contrary can be shown beyond a reasonable doubt, it shall be presumed that the accident arose out of employment. This interpretation is consistent with Decision No. 42/89.

In this case, the employer argued that the accident was caused solely by drug use. This theory could not be proven, but there was significant circumstantial evidence. Against this, there was a theory of employment relatedness based on spontaneous seizure. This theory was extremely unlikely and, even if accepted, the elements of employment-relatedness were not the seizure or the fall from bed but only the longer than normal fall and the harder than normal floor. In these circumstances the employment contribution was not significant.

The Panel found that it had been shown beyond a reasonable doubt that the accident did not arise out of employment. The Panel's doubt could not be characterized as reasonable since all reasonable theories of employment-relatedness had been effectively ruled out and there was a substantial theory that the injury arose from drug abuse.

The appeal was allowed. The Panel reserved its decision on issues concerning repayment of benefits.
[28 pages]

WCAT Decisions Considered: Interim Decision No. 24 (1986), 1 W.C.A.T.R. 93; Decision No. 72 (1986), 2 W.C.A.T.R. 28; Decision Nos. 426/88, 42/89

Cases Considered: Re Halco Inc. and Workers' Compensation Appeals Tribunal et al. (February 11, 1987) (Ont. Div. Ct.); Decision No. 39 (1974), 1 B.C.W.C.R. 158; Re Review of Decision No. 72 (September 28, 1988) (WCB Board of Directors); WCB v. CPR and Noell, [1952] 2 S.C.R. 359

DECISION NO. 985/89 (23/02/90) Signoroni McCombie Sutherland*Issue setting - Continuing entitlement.*

The worker suffered a neck and shoulder injury in 1977 and a head injury in 1978.

Continuing entitlement for the neck condition had been adjudicated to the final level of appeal at the Board. However, it was questionable whether the shoulder condition had been finally adjudicated. The Panel found that, in any event, the shoulder and neck conditions could not be separated and, using the whole person approach, should be adjudicated together.

There was continuity of complaint regarding the shoulder. The neck injury aggravated preexisting degenerative disc disease. The 1978 injury further aggravated the condition. The worker was entitled to further benefits. [7 pages]

DECISION NO. 50/90 (27/02/90) Carlan Acheson Clarke*Access to worker file, s.77 (material deleted).*

Access to the worker's file was granted to the employer, except for financial information which was contained in a memo of a pension interview and other financial information. [4 pages]

DECISION NO. 753/89R (28/02/90) Carlan Lebert Apsey*Reconsideration (procedural error) - Access to worker file, s.77.*

The worker applied to reconsider Decision No. 753/89, in which the worker's s.77 appeal was dismissed. That decision was made on the basis of written submission without an oral hearing. It was the Tribunal's practice to grant an oral hearing for s.77 appeals whenever requested by the parties. Oral hearings would be requested by making a checkmark in a box on the application form. In the absence of a checkmark, the parties would be contacted to determine whether an oral hearing was wanted.

Although there was no fundamental error in process in this case, the standard practice was breached. In the circumstances of this case, the Panel granted the reconsideration request in order to ensure that the worker was satisfied that his grievances were properly heard and considered.

On the merits of the s.77 appeal, access to the worker's file was granted to the employer. [4 pages]

WCAT Decisions Considered: 72R, 72R2

DECISION NO. 768/89 (28/02/90) Signoroni Jackson Nipshagen*Issue setting - Withdrawal (of appeal).*

The worker appealed a decision of the Appeals Adjudicator. The issues raised by the worker were continuing entitlement to temporary benefits from September 1982, when temporary benefits were finalized, to February 1983, when a pension was granted, and entitlement to a temporary supplement subsequent to February 1983.

A number of sub-issues arose, including whether the Board granted entitlement for a low back condition, the effect of a number of medical conditions mentioned in reports but not yet adjudicated and whether the Panel should determine the threshold issue only in regard to the supplement.

The Panel ruled that the threshold issue could not be severed from the other statutory provisions in s.45(5). In view of this ruling and the other unresolved sub-issues, the Panel granted the worker's request to withdraw his appeal. [6 pages]

DECISION NO. 21/90 (28/02/90) Faubert Drennan Nipshagen

Psychotraumatic disability.

In February 1987, a piece of dirt entered the worker's left eye, causing a corneal abrasion, which healed within one or two days, and possibly a retinal separation, which was lasered. In late April 1987, the worker attended his doctor because of pain in the left eye. Medication was prescribed, which provided complete relief. However, the worker was not allowed to work because of the medication.

There was no continuing organic disability. One medical report referred to a severe anxiety stage, which persisted until late June 1987. The Panel found that the worker was not entitled to benefits for psychotraumatic disability. While off work and taking the medication, the worker felt normal, was able to cut firewood and build a cabin and did not feel incapacitated by the medication. This was not consistent with the existence of a psychotraumatic disability diagnosed as anxiety state.

The worker was not entitled to benefits for lost time in May and June 1987. [8 pages]

Board Directives and Guidelines: Claims Adjudication Branch Procedures Manual, Document no. 33-21-01; Claims Services Division Manual, s.71(3), p.207, Directive 22

DECISION NO. 117/90 (28/02/90) Carlan McCombie Ronson

Access to worker file, s.77.

Access to the worker's file was granted to the employer. [4 pages]

DECISION NO. 65/90 (28/02/90) Bigras Robillard Apsey

Commutation (business investment).

The worker appealed a decision of the Hearings Officer denying a partial commutation, in the amount of \$30,000, of the worker's pension. The worker wanted to establish a delivery business. The worker had a monthly income of about \$825. The partial commutation would reduce his monthly pension by \$190. By helping to establish a business, the worker's CPP pension of about \$500 per month would be jeopardized.

The worker had not provided a workable business plan. In addition, he had previously tried and failed in a delivery business. The commutation would jeopardized the worker's present income without reliable replacement income. The appeal was dismissed. [4 pages]

Board Directives and Guidelines: Guidelines for the Commutation of Pensions, Board Minute 3, March 20, 1989, p.71

DECISION NO. 339/89 (28/02/90) Bigras McCombie (dissenting) Cabinet

Psychotraumatic disability - Pensions (provisional) (extension) - Motivation - Intervening causes (undermotivation) - Significant contribution (of compensable accident to disability) - Causation (thin skull doctrine) - Board Directives and Guidelines (pensions) (provisional).

The worker suffered a herniated disc due to a compensable accident in March 1970. In November 1971 he was awarded a pension which was periodically increased. In January 1976, psychoneurosis was diagnosed and the worker was awarded a two-year lump sum provisional pension. On the expiry of that period, the Board denied entitlement to any further pension award for the worker's psychotraumatic disability. The worker appealed.

The majority of the Panel accepted that the work accident may have triggered a psychological reaction in the worker; but concluded that the accident was not a significant contributing factor to the psychological condition. The accident was not traumatic and thus was not of a nature that would likely significantly contribute to a psychological condition after a five-year latency period.

The Board offered the worker extensive rehabilitation opportunities, but he failed to pursue jobs and training programs. Pursuant to Decision No. 915, only "terminal undermotivation" could be an intervening factor which would of itself bar compensation. However, a lesser degree of undermotivation can be seen as a test to determine the contributing cause of psychogenic factors in disabilities.

The worker complained of lack of Board support and inadequate medical treatment, but his most serious problem was his obsession with alleged financial problems flowing from his unemployment situation. The worker's psychological problems were never related by the medical reports to the organic disability. The psychological problems were attributable to the worker's situation, not to a reaction to his medical condition.

The diagnosed source of the worker's problem was his emotional reaction to the denial of more substantive benefits. There could be no entitlement for this reaction since the Board's handling of the case had been reasonable and correct.

The majority of the Panel agreed that the worker's condition had not changed over the two-year period for which the lump sum pension was granted, but rejected the worker's argument that it was therefore unreasonable to terminate benefits.

It was the Board's policy to grant lump sum benefits when it was shown that a psychological condition which did not result from the compensable injury hindered the worker's rehabilitation and recovery. Such a therapeutic measure could be considered to be in the best interests of the Accident Fund in that it might help avoid further payment for permanent disability. Further, at the onset of a psychological problem, there may not be diagnostic certainty as to the cause, but timely Board assistance could help lead to early recovery.

In this case, the worker had a physical disability and his rehabilitation appeared to be hindered by a psychological condition. It was thus appropriate for the Board to grant a lump sum award to encourage rehabilitation. As this proved not to be the solution, and as the accident was not a significant contributing factor to the psychological condition, it was appropriate for this Board not to grant further benefits.

The appeal was dismissed.

The Worker Member, dissenting, would have allowed the appeal. The medical evidence suggested that the worker's emotional problems resulted from a combination of his response to his organic disability, fear of the proposed treatment (back surgery), his frustration due to diminishing job prospects, and a possible predisposition to undermotivation. The compensable factors constituted a significant component of the disability.

When the majority found the worker's inherent undermotivation to be a contributing cause of the worker's

disability, it considered undermotivation in the sense of a latent predisposition, rather than as a post-accident intervening cause, as envisaged in Decision No. 915. A latent predisposition which would manifest itself as undermotivation would be covered by the "frail spirit" and "thin skulled plaintiff" doctrines which have generally been adopted by worker's compensation system.

The finding that the Board's actions were reasonable and correct was not determinative. It was possible to understand, in the circumstances of this case, how the worker could be frustrated and depressed by the Board's institutional response, without blaming the Board. It would be as inappropriate to start weighting blame with respect to this secondary condition as it was with respect to initial entitlement. The fact that the worker's perception of poor treatment was found to be mistaken, should not automatically disentitle him to benefits. [25 pages]

WCAT Decisions Considered: Decision No. 915 (1987), 7 W.C.A.T.R. 1; Decision No. 339/89L
Practice Directions Considered: Practice Direction No. 9 (1987), 7 W.C.A.T.R. 444; 7 W.C.A.T.R. 451 (French)
Board Directives and Guidelines: Claims Services Division Manual, s.71(3), p.207, Directive 22; Claims Services Division Manual, s.71(3), p. 209, Directive 23; Practice, Lump Sum Award for Psychological Disability, Board Minute #15, June 12, 1979, p.4797

DECISION NO. 285/89 (28/02/90) Faubert Drennan Apsey

Consequences of injury (altered gait) - Preexisting condition (varus deformity) - Osteoarthritis (knee).

The worker suffered a right knee injury in 1958, for which he lost no time. He suffered a left knee injury in 1977, which required surgery and for which he was awarded a pension. In 1983, he underwent right knee surgery.

The worker was entitled to benefits for the right knee condition. The worker had a preexisting varus deformity. Medical opinion from a s.86h assessor stated that a varus deformity can remain asymptomatic for life but a person with varus deformity is prone to develop medial compartment problems with relatively minor injury.

The 1958 injury, together with the development of the varus deformity, were factors in development of osteoarthritis in the medial compartment of the worker's right knee. The right knee condition was aggravated by the 1977 injury and surgery to the left knee, which resulted in added weight bearing on the right knee. [12 pages]

Board Directives and Guidelines: Claims Services Division Manual, s.108(2), p.235, Directive 1

DECISION NO. 1028/89 (01/03/90) Moore Robillard Nipshagen

Delay (onset of symptoms) - Conjunctivitis.

The worker was struck on the right side of the face on April 7, 1984. He laid off from April 9 to April 23 with an inflammation of the right eye diagnosed as purulent conjunctivitis.

The worker was entitled to benefits for the lay-off. On the evidence, the worker was struck on the area surrounding the right eye. There was medical opinion that bacteria got into the eye as a result of the injury and that the bacteria multiplied over the next 24 hours, causing the conjunctivitis. [5 pages]

DECISION NO. 25/90 (01/03/90) Chapnik Fox Nipshagen

Access to worker file, s.77 (issue in dispute) (relevance) (new information).

Access to the worker's file was granted to the employer, except for references to financial information. The worker submitted that documents that came into existence after the date of the hearing before the Hearings Officer should have been scheduled, should not be released. The Panel rejected the submission, finding that all relevant documents should be released. [5 pages]

DECISION NO. 611/89 (01/03/90) Hartman McCombie Jewell

Withdrawal (of appeal).

An appeal regarding earnings basis was adjourned to allow a new Case Description to be drafted which would address a number of relevant sub-issues. Prior to reconvening the hearing, the worker requested to withdraw the appeal. The worker's representative clarified that the worker would not be appealing at a later date.

The Panel granted the worker's request to abandon the appeal. [3 pages]

DECISION NO. 61/90I (01/03/90) Hartman Robillard Apsey

Adjournment (additional evidence).

The worker's widow appealed a decision denying entitlement for the worker's death from cancer of the lung and kidney. In pre-hearing preparation, the Tribunal Counsel Office obtained a report identifying areas where further information would be required and raising the possibility of asbestosis.

The Panel granted an adjournment to allow the worker to decide whether to pursue an asbestosis claim at the Board. [3 pages]

**DECISION NO. 674/89 (01/03/90) Onen Higson Meslin
Jewer v. Davis**

Section 15 application - In the course of employment (parking lots) - In the course of employment (takes self out of employment) (intoxication) - Arising out of employment (parking lots) - Arising out of employment (instrument of added peril).

The plaintiff and defendant were involved in a motor vehicle accident in the employer's parking lot.

The Panel reviewed Tribunal decisions regarding accidents in employer parking lots. The Panel preferred the line of decisions that placed less emphasis on whether the accident occurred on the employer's premises and placed paramount importance upon the nature of the activity undertaken by the worker. The Panel found a rigid application of the premises test to be unreasonable.

"In the course of" employment is intended to address the status of the worker at the relevant time and "arising out of" employment is intended to determine whether the specific facts of the accident are sufficiently connected to employment. In this case, both workers were in the course of employment. The plaintiff was arriving to start his shift. The defendant was leaving after finishing his shift. Even if the

defendant was driving too fast or under the influence of alcohol, he had not embarked on a course of personal activity which rendered an employment connection insignificant.

Use of an automobile does not, in and of itself, lead to the conclusion that the accident did not arise out of employment. The predominant nature of the activity was related to employment. The Panel was satisfied that the accident arose out of employment.

The plaintiff's right of action was taken away. [11 pages]

WCAT Decisions Considered: Decision No. 547/87 (1988), 8 W.C.A.T.R. 160; Decision Nos. 553, 690/87, 738/87, 977/88
Board Directives and Guidelines: Claims Services Division Manual, s.3(1), p.47, Directive 21

DECISION NO. 1040/89 (02/03/90) Starkman Klym Nipshagen

Supplements, temporary - Availability for employment (considering self totally disabled).

The worker suffered a shoulder injury in 1980, for which she was awarded a 15% pension. She received a supplement from August 1985 to December 1985 but the Board denied a supplement from December 1985 to May 1986.

The worker met the threshold requirement for a supplement. However, the worker considered herself totally disabled and was not available for employment. The worker was not entitled to a supplement subsequent to December 1985. [8 pages]

Board Directives and Guidelines: Claims Services Division Manual, s.45(5), p.174, Directive 1

DECISION NO. 93/89 (02/03/90) Sperdakos Cook Jago

Baril v. C. Valeri Construction Ltd.

*Section 15 application (remoteness) - Supplier of motor vehicle, machinery or equipment -
In the course of employment (contemporaneity) - Damages, contribution or indemnity - Derivative action.*

The plaintiff worked on a construction site. The defendant supplied propane heating equipment to the site. The third parties included the general contractor and a subcontractor who was the plaintiff's employer.

It is, generally, inappropriate for an employer to be required to indemnify itself against lawsuits with respect to injuries which arise out of the workplace when it is at the same time contributing to the worker's compensation fund for the same purpose. However, s.8(10) creates a clear exception when an employer supplies equipment without also supplying workers.

The plaintiff commenced this action against the defendant, not in its capacity as an employer but in its capacity as a supplier of equipment. The defendant supplied heaters on a rental basis without supplying workers. Accordingly s.8(10) applied. The plaintiff's right of action against the defendant was not taken away.

Section 8(11) applied, so that if any of the third parties are found liable, no damages, contribution or indemnity are recoverable for the portion of the loss or damage caused by their fault or negligence.

The Panel did not have jurisdiction with regard to the derivative action of the worker's wife. Since the worker was alive, she was not a dependant within the meaning of the Act. However, pursuant to s.14, the wife could not bring action against the worker's employer. [11 pages]

WCAT Decisions Considered: Decision No. 725 (1987), 4 W.C.A.T.R. 266; Decision No. 507 (1988), 266; Decision Nos. 1186/87, 1266/87
Cases Considered: Meyer and McDermott v. WCB (1987), 15 O.A.C. 202 (Ont. Div. Ct.), aff'd Ont. C.A. Mar. 25, 1988

DECISION NO. 104/90 (02/03/90) Onen Robillard Meslin*Medical examination (section 21).*

The worker suffered a hand and wrist injury. The employer applied for an order requiring the worker to attend a medical examination by a specialist in family medicine regarding the nature of the worker's injury and the level of her function.

The Board file contained extensive medical reports by an orthopaedic specialist. There was also an extensive, analytical report by a specialist in physical medicine and a report of a pension examination. The employer had not sought access to the worker's file since August 1988.

The worker was not required to attend the examination. The employer's application was at least premature and, perhaps, unnecessary in view of the specialists' reports already on file. [4 pages]

DECISION NO. 95/90 (05/03/90) Carlan Robillard Meslin*Temporary total disability - Pensions (lump sum) (10% pension) (advantage to worker).*

The worker suffered a low back injury in 1985. The Board reduced benefits to 50% from May 1986 to April 1988. He was later awarded a 10% pension.

The worker was under active medical care from May 1986 to July 1987. He was entitled to temporary total disability benefits for that period. From July 1987 to April 1988, he was partially disabled and disqualified from receiving full benefits since he was not cooperating or looking for a job.

The worker requested commutation of his pension for purposes of starting a business. Although, s.45(4) was applicable, it would not be to the advantage of the worker to pay the pension in a lump sum. The worker had not engaged in gainful employment since the accident. His pension and supplement were his main source of income. He produced no evidence of the viability of his business proposal. His back condition was prone to deterioration. Therefore, the request was denied. [9 pages]

WCAT Decisions Considered: 295/88

DECISION NO. 129/90 (05/03/90) Kenny Robillard Nipshagen*Rehabilitation, vocational (programme not offered by Board) - Availability for employment (job search).*

A heavy equipment operator suffered a neck and shoulder injury in July 1985. The Board reduced benefits to 50% subsequent to June 1986.

The worker was 54 years old. He could not perform the type of work he had performed throughout his working life. He had limited education and limited English. He lived in an area where there were a limited number of employers. In these circumstances, it was important for the Board to provide vocational rehabilitation services. In the absence of such assistance, the Panel was satisfied that the worker's job search was sufficient to satisfy the requirements of the Act. The worker was entitled to full benefits. [12 pages]

WCAT Decisions Considered: Final Decision No. 2 (1987), 4 W.C.A.T.R. 1; Decision No. 121 (1986), 3 W.C.A.T.R. 81; Decision No. 137 (1987), 4 W.C.A.T.R. 87; Decision No. 187/88

DECISION NO. 120/90 (05/03/90) Kenny Robillard Nipshagen

Consequences of injury (iatrogenic illness) (medication) - Consequences of injury (residual weakness) - Retinal detachment.

The worker suffered from compensable chronic bronchitis and emphysema. In 1983, the worker underwent surgery for retinal detachment. The worker claimed that the retinal detachment was related either to medication (prednisone) which he took for his compensable conditions or to severe coughing from the compensable conditions.

A report obtained by the Tribunal from a specialist dealing with disorders of the retina stated the detached retina could be related to cataract surgery and to lattice degeneration. Systemic corticosteroids would have no direct association with retinal detachment. However, there was evidence of a relationship between long term corticosteroid medication and cataract formation.

The worker had cataract surgery in the early or mid 1970s. From records, it appeared that the worker did not take prednisone until 1979. Even if he did take it in the early 1970s, the length of time he took it and the dosage may have been less than the minimums associated with cataract formation.

Further, specialists did not support an association between coughing and the retinal detachment.

The condition was likely caused by age-related lattice degeneration. The non-compensable cataract surgery was also a possible contributing factor.

The appeal was dismissed. [9 pages]

WCAT Decisions Considered: 243/88, 873/89

Appendices: Medical report excerpt with background information about retinal detachment.

DECISION NO. 128/90 (05/03/90) Carlan McCombie Ronson

Access to worker file, s.77.

Access to the worker's file was granted to the employer. The issues in dispute were initial and ongoing entitlement. Documents were released that related to both issues in dispute. [4 pages]

DECISION NO. 925/89 (06/03/90) Chapnik Lebert Seguin

Pensions (assessment) (shoulder) - Supplements, temporary - Rehabilitation, vocational (economic conditions).

A miner suffered injuries in March 1985 when he was hit by a fender. In April 1987, he was awarded a 15% pension. He received a temporary supplement until November 1987.

The worker had tenderness in the neck, shoulder and thoracic region with some narrowness of the right shoulder but a full range of motion, no neurological symptoms, no spasm and no symptoms in the lower back. The Panel found that the 15% rating correctly measured his disability. However, a new assessment should be conducted due to recent medical reports which indicate possible disability in the low back.

The worker's file was closed in November 1987. It was noted that the worker lived in a remote area where employment opportunities were limited and that academic training was not feasible. The worker had limited work skills, grade 3 education and limited English. The Panel found that the worker was entitled to the supplement until July 26, 1989, when new provisions came into effect. There was no indication that some type

of employment or retraining services would not have been possible had they been made available to him. In the circumstances, the worker made reasonable efforts to find modified employment. [9 pages]

WCAT Decisions Considered: Decision No. 915 (1987), 7 W.C.A.T.R. 1; Decision No. 124/88 (1988), 9 W.C.A.T.R. 231
Board Directives and Guidelines: Operational Policy Manual, Document no. 05-03-03

DECISION NO. 136/90I (06/03/90) Kenny Cook Jago

Access to worker file, s.77 - Freedom of Information.

In a s.77 appeal, the Panel allowed opportunity for further submissions, either in writing or by oral hearing, regarding the issue of the relationship between the Freedom of Information and Protection of Privacy Act, 1987, and s.77 of the Workers' Compensation Act. [3 pages]

DECISION NO. 138/90 (06/03/90) Kenny Cook Jago

Access to worker file, s.77.

Access to the worker's file was granted to the employer. [3 pages]

DECISION NO. 137/90 (06/03/90) Kenny Cook Jago

Access to worker file, s.77.

Access to the worker's file was granted to the employer. [3 pages]

DECISION NO. 573/89I (06/03/90) Strachan Robillard Jago

Adjournment (referral to Board).

The hearing was adjourned and the matter referred to the Board for determination of a chronic pain issue. [4 pages]

DECISION NO. 102/88R (07/03/90) Bigras McCombie Preston

Reconsideration (error of facts).

An application to reconsider Decision No. 102/88 was dismissed. There were no procedural errors or errors of law. A minor factual error would not have changed the result. [3 pages]

WCAT Decisions Considered: Decision No. 95R (1989), 11 W.C.A.T.R. 1; Decision Nos. 72R, 72R2, 102/88

DECISION NO. 60/90 (07/03/90) Bradbury Beattie Preston

Temporary disability (beyond pension level) - Pensions (assessment) (back) - Chronic pain (marked life disruption).

The worker suffered a back injury in September 1982, for which he was awarded a 10% pension.

Evidence did not support a sudden onset of back pain in 1984. The worker was not disabled beyond his pension level.

Pension assessments in 1984, 1986 and 1988 all reported the same symptoms with no deterioration in condition over time. The worker was not entitled to an increase in his pension.

The worker was not entitled to benefits for chronic pain. Any subjective findings were not inconsistent with the pension level. There was no marked life disruption. [6 pages]

Board Directives and Guidelines: Guidelines for the Interim Chronic Pain Disorder Policy, Board Minute 1, May 2, 1989, p.74

DECISION NO. 143/90 (07/03/90) Signoroni Robillard Meslin

Withdrawal (of appeal) - Jurisdiction, Tribunal (final decision of Board).

The worker was appealing the level of his pension. The worker's file had been returned to the Board pursuant to Practice Direction No. 9. After a negative ruling from the Claims Adjudications Branch, the worker returned to the Tribunal.

The Tribunal had jurisdiction. However, the worker had not been reassessed from 1983. The appeal was withdrawn without prejudice, so that the worker could pursue both organic and non-organic claims further at the Board. [3 pages]

WCAT Decisions Considered: Decision No. 915 (1987), 7 W.C.A.T.R. 1

Practice Directions Considered: Practice Direction No.9, (1987), 7 W.C.A.T.R. 444

DECISION NO. 92/90L (07/03/90) Bigras Lebert Nipshagen

Withdrawal (of application) - Jurisdiction, Board (reconsideration of Appeal Board Decision).

The worker applied for leave to appeal an Appeal Board decision denying continuing entitlement subsequent to 1981. In addition, the worker applied to the Board to reconsider the Appeal Board decision and grant a pension. This application to reconsider was dismissed by a Claims Adjudicator but had not yet been considered by other levels of appeal.

The worker asked that the reconsideration process at the Board be finalized before the leave application is heard. The application for leave to appeal was withdrawn without prejudice. [5 pages]

WCAT Decisions Considered: 669/87L

DECISION NO. 91/90 (07/03/90) Bigras Lebert Nipshagen

Commutation (debt liquidation) (home mortgage) - Commutation (vehicle purchase) - Discretion, Board (commutation).

The worker suffered a hand injury for which he was awarded a 35% pension, valued at about \$155,000.

The worker requested commutation of \$105,000 of his pension, of which \$85,000 was to pay off a mortgage on his home and \$20,000 was to buy a new car.

According to the worker's financial statement, his income and expenses were approximately equal. A commutation of \$105,000 would leave a monthly surplus of about \$535. A commutation of \$20,000 for the car only would still leave income and expenses approximately equal.

If Board guidelines are considered as inflexible rules, they will unlawfully fetter the discretion to grant commutations. The worker did not meet the requirements of the Board guidelines since he did not have evidence from a psychiatrist that his financial situation was producing a disability. Nor did he meet the requirements for mortgage liquidation since the disability was not preventing him from maintaining employment.

The worker was entitled to the \$20,000 commutation to buy a new car. He needed the car for his job. His old car required frequent costly repairs. The general requirements of the Act were met and there were clear long term benefits.

However, there was no rehabilitation related component to the commutation for mortgage liquidation. The request did not meet the general thrust of the requirements for commutation. There was no significant disability-related stress factor which would be eliminated by the commutation. Although the worker's financial statement showed little surplus, there was other income not shown on the statement, such as his spouse's income. [9 pages]

WCAT Decisions Considered: Decision No. 569/88 (1988), 9 W.C.A.T.R. 342; Decision Nos. 706, 126/87, 505/87
Board Directives and Guidelines: Vocational Rehabilitation Division Manual, Document no. 01-01-02; Document no. 04-01-02; Guidelines for the Commutation of Pension, Jan. 15, 1988; Guidelines for the Commutation of Pensions, Board Minute 3, Mar. 20, 1989, p.71

DECISION NO. 687/89 (07/03/90) Chapnik McCombie Howes

Disablement (repetitive work).

The worker was entitled to benefits for a work-related accident in the nature of a disablement. The worker operated a fur-beating machine which was equipped with a foot pedal that had to be depressed 200 to 250 times per hour. The machine was old and vibrated excessively.

The worker had complained to co-workers of back pain prior to the date of his lay-off. The worker's back pain gradually worsened over the period of a year after he was ordered to remove a block of wood which he had wedged under the pedal. The block of wood prevented the worker from having to use his left foot continually to operate the machine and meant that he could stand on both legs while working, rather than one.

The Panel accepted evidence of co-workers that the worker was working eight to nine hours per day on the machine, rather than the maximum of four hours per day suggested by the employer's witnesses. In any event, the worker's job requirements were quite onerous and were particularly onerous during the period in question. [8 pages]

Board Directives and Guidelines: Claims Adjudication Branch Procedures Manual, Document No. 33-01-02; Claims Services Division Manual, s.1(1)(a) p.1, Directive 2; Interpretation Bulletin, Interpretation of "personal injury by accident", "chance event", and "disablement", October 19, 1988.

DECISION NO. 292/89 (07/03/90) Chapnik (dissenting) Fox Ronson

Health care (medical aid) (escorts) - Pensions (assessment) (vertigo) - Suitable employment.

The worker suffered a perforation of the tympanic membrane. Despite surgery, the worker's vertigo and

sensorineural loss in the left ear persisted. The worker was granted a 7% pension: 5% for his 70 decibel hearing loss and 2% for "periodic vertigo and tinnitus". The worker appealed the portion of the pension award which related to his vertigo.

The worker's vertigo prevented him from driving and from working or being around machinery. The worker did not suffer from tinnitus. The Board apparently concluded that vertigo accompanying hearing loss was comparable to tinnitus. This comparison was never properly evaluated by medical experts. There was nothing before the Panel to assist it in evaluating the 2% rating or to understand the benchmarks used in the Rating Schedule for pensions relating to hearing impairment. The matter of the 2% rating was remitted to the Board for reassessment.

The majority of the Panel allowed the worker's claim for an escort allowance to his wife for driving him to his medical and Board appointments. The worker was unable to drive because of his vertigo, he resided in a rural area where there was no public transportation immediately available and he did not have a telephone which prevented him from calling taxi cabs. However, since escort allowances were based on the need for health care, no amount was payable for the wife driving the worker for the purposes of finding employment.

The Panel found that a janitorial job offered to the worker by the employer fell within his medical restrictions as it did not require him to climb tall ladders or to work close to machinery. By refusing to undertake suitable employment, the worker disqualified himself from receiving total temporary benefits and a temporary supplement.

The Panel Chairman, dissenting, concurred with the majority in all aspects of the decision except the granting of the escort allowance. It was not necessary that the worker have an escort due to medical reasons. His need for an escort stemmed from his economic situation and his choice of location of his residence. There was no indication that the worker could not have arranged for alternate transportation. [15 pages]

WCAT Decisions Considered: Decision No. 915 (1987), 7 W.C.A.T.R. 1; Decision No. 124/88 (1988), 9 W.C.A.T.R. 231; Decision No. 212/88 (1988), 9 W.C.A.T.R. 248; Decision No. 349/88

Board Directives and Guidelines: Operational Policy Manual, Document No. 06-01-03

DECISION NO. 147/90 (08/03/90) Bigras Fox Apsey

Access to worker file, s.77 (material deleted).

Access to the worker's file was granted to the employer, except for a psychological evaluation which was not required for employer's purpose of contesting ongoing entitlement. The report gave a life history, which was unnecessary in the present case. The report's findings did not contain any medical facts which could not be found elsewhere. [3 pages]

DECISION NO. 848/88LF (09/03/90) Chapnik Cook Seguin

Leave to appeal (good reason to doubt correctness) (subsequent Board decision) - Jurisdiction, Tribunal (final decision of Board) (reconsideration of Appeal Board decision) - Jurisdiction, Tribunal (leave to appeal).

The worker applied for leave to appeal a decision of the Appeal Board denying temporary disability benefits from May 1979 to May 1980. In Decision No. 848/88L, the Panel found that the worker could appeal as of right on the issue of entitlement to temporary partial disability benefits during that period since that issue had not been considered by the Appeal Board. However, the worker still wanted leave to appeal on the issue of temporary total disability.

After an investigation by the Ombudsman in 1986, a Review Committee of the Board granted a 10% pension for psychological disability retroactive to the date of the accident in 1978.

There was good reason to doubt the correctness of the Appeal Board decision. The Appeal Board decision may have been different had it been aware of a compensable psychological condition.

After the hearing, the Panel became aware of Tribunal decisions finding that reconsideration of an Appeal Board decision by a Review Committee constituted a new final decision of the Board. Accordingly, there was an appeal as of right from the decision of the Review Committee. [7 pages]

WCAT Decisions Considered: 669/87L, 258/88

DECISION NO. 479/89 (09/03/90) Bigras Drennan Preston

Pensions (assessment) (back).

The worker suffered a back injury in 1963 for which he was awarded a 20% pension and a further back injury in 1982 for which he was awarded a 10% pension.

Prior to the hearing the Panel arranged for a new pension assessment. The Panel followed the recommendation of the assessment and increased the pension for the 1982 injury to 20%. [3 pages]

DECISION NO. 67/90 (09/03/90) Bigras Drennan Nipshagen

Chronic pain.

The worker suffered a wrist injury in 1981, for which he was awarded a 3% pension. The worker appealed a decision of the Hearings officer denying entitlement for chronic pain.

Pension examinations in 1984, 1985 and 1986 took into consideration organic signs of disability. The examinations noted complaints of pain. However, the pain which the worker described on the pension examinations and to a doctor not employed by the Board did not exceed levels which are considered normal for this type of injury. The appeal was dismissed. [10 pages]

Board Directives and Guidelines: Chronic Pain Disorder Policy, Board Minute 2, July 3, 1987, p.5196; Guidelines for the Interim Chronic Pain Disorder Policy, Board Minute 1, May 8, 1989, p.74

DECISION NO. 102/90 (09/03/90) Bigras Cook Seguin

Pensions (assessment) (shoulder) - Pensions (assessment) (enhancement factor) - Chronic pain.

In 1976, the worker suffered a left shoulder injury, diagnosed as tendonitis, for which he was awarded a 3% pension in 1978, later increased to 5% then to 10%. The worker appealed a decision of the Hearings Officer denying an increase in the pension and denying entitlement for chronic pain.

The worker was not entitled to benefits for chronic pain. The continuing pain was caused not by chronic pain but, rather, by a rotator cuff tear, which was not diagnosed until 1983.

The Rating Schedule for shoulder injuries provides for a 5% rating where shoulder abduction is limited to 90 degrees and 15% when the humeral joint is ankylosed. In this case, the shoulder was not ankylosed but the pain resulting from the rotator cuff tear prevented the worker from using the shoulder normally. Arm abduction could be forced by doctors, but these movements were accompanied by severe pain. This pain, from organic source, reduced the worker's ability to function to a higher degree than recognized by the 10%

pension. The Panel increased the pension to 15%, retroactive to three months before the rotator cuff tear was diagnosed in 1983.

The worker also was receiving a pension for a crushing injury of the right hand in 1962. The worker was entitled to an enhancement factor of half the rating for the lesser injury. [10 pages]

WCAT Decisions Considered: Decision No. 915 (1987), 7 W.C.A.T.R. 1; Decision No. 638/89I

Board Directives and Guidelines: Guidelines for the Interim Chronic Pain Disorder Policy, Board Minute 1, May 2, 1989, p.74

DECISION NO. 57/90 (09/03/90) Chapnik Cook Sutherland

Disablement (nature of work) - Transportation industry (truck driver) - Hemorrhoids.

The worker was employed as a truck driver since 1976. He stated that about 1979 he began to experience problems with hemorrhoids. In November 1985 the worker underwent surgery for his hemorrhoid condition. The worker's job was particularly onerous from January to November 1985 at which time he worked long hours and drove heavy loads.

The worker suffered a disablement arising out of and in the course of his employment. There was literature indicating that truck drivers, particularly long-distance drivers, had a higher incidence of haemorrhoidal problems. The worker's specialist also related the condition to the work.

Even if the work was only likely to have aggravated an asymptomatic underlying predisposition to hemorrhoids, as postulated by the Board doctor, the worker would be entitled to benefits for the acute periods of aggravation, under Board policy. [6 pages]

Board Directives and Guidelines: Claims Adjudication Branch Procedures Manual, Document No. 33-01-02;

Claims Services Division Manual, s.1(1)(a) p.1, Directive 2; Claims Services Division Manual, s.108(2) p.235,

Directive 1; Interpretation Bulletin, Interpretation of "personal injury by accident", "chance event", and "disablement", October 19, 1988

DECISION NO. 168/90 (12/03/90) Strachan Robillard Nipshagen

Access to worker file, s.77.

Access to the worker's file was granted to the employer. [3 pages]

DECISION NO. 155/90 (12/03/90) Onen Robillard Apsey

French v. Gott

Section 15 application.

The plaintiff's right of action regarding a motor vehicle accident was taken away against the driver of the other vehicle and the other driver's employer. No damages, contribution or indemnity would be recoverable against the company that held the registration of the vehicle owned by the other driver. [7 pages]

DECISION NO. 774/89 (12/03/90) Starkman Cook Nipshagen (dissenting)

Personal coverage (commencement) - Worker - Executive officers - Construction.

The appellant was an executive officer of a company. He also worked as an electrician for the company.

The appellant claimed that he requested personal coverage in February 1987. However, the Board did not have any record of having received it. The appellant was injured in September 1987. The Hearings Officer denied coverage.

The majority of the Panel stated that an executive officer who also works for the corporation would be entitled to benefits for an accident occurring while working as a worker for the corporation. However, in this case, the appellant was injured while helping an acquaintance build a house for personal use. Considering s.1(1)(z) of the Act and ss. 4 and 8 of Regulation 951, it was apparent that persons who employ workers in the construction of a house for their own use are not included in Part 1 of the Act. Therefore, the appellant would fall within the exclusion in s.1(1)(z) since he was employed otherwise than for the purposes of the employer's industry.

The majority then considered whether the appellant made an election for personal coverage under s.11. To apply for coverage, the majority was of the opinion that a person must form a clear intention to apply for coverage and make reasonable efforts to communicate that intention to the Board. In this case, it was not clear what happened to the appellant's application. However, the majority was satisfied that the appellant met the criteria. Therefore, the appellant was a deemed worker at the time of the accident.

The Employer Member, dissenting, agreed with Decision No. 807/89 and found that, although the appellant may have intended to apply for coverage, it had not been established that the application had been mailed to and received by the Board. Therefore, personal coverage was not in effect. [9 pages]

WCAT Decisions Considered: 807/89

Regulations Considered: Reg. 951, ss.4, 8

Board Directives and Guidelines: Employer Assessment Policies Manual, Document no. 02-04-02

DECISION NO. 1045/89 (12/03/90) Signoroni Cook Meslin

Disability - Aggravation (preexisting condition) (asthma) - Temporary partial disability (wage loss benefits).

A welder aggravated his pre-existing non-compensable asthma by exposure to welding fumes from galvanized steel in June 1986. He returned to modified work at a wage loss from August 1986 to January 1987.

The Panel found that the worker continued to suffer from the compensable aggravation until January 1987 and that the worker was entitled to wage loss benefits until that date. Disability should not be defined narrowly, considering s.45(12) of the Act and Board policy. Directive 12 under s.122(1) of the Claims Services Division Manual states that disability would apply to a non-physically disabling condition which bars the worker from earning full wages. In this case, the worker could not have resumed his pre-accident employment without running the risk of further, and likely permanent, deterioration of his asthmatic condition. [7 pages]

Board Directives and Guidelines: Claims Services Division Manual, s.122(1), p.257, Directive 12

DECISION NO. 101/90 (12/03/90) Strachan Jackson Meslin

Arising out of employment (reasonably incidental activity test) - In the course of employment (break) - Misconduct - Chance event.

The worker was in the lunchroom area of the employer's premises, during the morning break when he purchased a dessert from the vending machine. As the machine did not deliver the dessert, the worker and a co-worker tilted the machine backwards in an attempt to dislodge the dessert. The worker injured his neck and shoulder while tilting the machine.

The employer did not argue that s.3(7) was applicable. The employer maintained that there was "wilful misconduct", but acknowledged that it was not "serious". Further, since the worker was off for more than 6 weeks, the disability would be considered "serious", under Board policy.

The act of tilting the vending machine represented an identifiable occurrence, separate from any injury, and came within the definition of "accident" as a "chance event occasioned by physical or natural cause". The worker was in the course of employment since he was on his employer's premises and he was taking an approved break as part of his normal employment activity.

The taking of a coffee break was reasonably incidental to the worker's employment. However, since the worker knew about the employer's policy against tampering with vending machines and about the refund policy that was in place to obviate the need for tampering, an injury resulting from tampering with the machine did not arise out of the employment. Deliberate misuse of the lunchroom equipment, contrary to known policy, was not something reasonably incidental to the worker's employment. Tilting the vending machine was not an activity reasonably expected of the worker and was not carried out for the benefit of the employer.

The employer did not condone such improper activity. This was evidenced by company rules, the refund policy and the posting of at least one notice concerning tampering with vending machines. The worker was not entitled to benefits. [9 pages]

Board Directives and Guidelines: Claims Adjudication Branch Procedures Manual, Document Nos. 33-05-01, 33-05-07, 33-14-01 Claims Services Division Manual, s.3(1) p.47, Directive 21

DECISION NO. 19/90 (13/03/90) Chapnik Lebert Shuel

Subsequent incidents (outside work) - Disablement (change in work) - Intervening causes.

A meat wrapper suffered a low back strain in December 1983 and was off work for one month. In June 1986, the worker suffered a severe onset pain at home while bending over to pick up a garden hose.

On the evidence, the strain in December 1983 had resolved by the time the worker returned to work in January 1984.

The worker's job as a meat wrapper was strenuous and became even more so in May 1986 when machinery broke down. The worker complained about back pain in the period immediately preceding the accident in June 1986. The incident with the garden hose was not an intervening event. The accident stemmed from the worker's employment during the previous month. The worker was entitled to benefits for the lay-off in June 1986. [7 pages]

DECISION NO. 681/89 (13/03/90) Moore Klym Nipshagen

Asthma - Medical opinion (asthma) - Exposure (methyl ethyl ketone) - Benefit of the doubt.

The employer appealed a decision of the Hearings Officer granting benefits for the worker's respiratory condition subsequent to December 1984 which the worker claimed was related to exposure to chemicals at his gluing station.

The principal medical reports were from the treating respirologist and the Board's senior chest disease consultant. The respirologist's report stated that the worker suffered from asthma seemingly related to exposure to methyl ethyl ketone. The Board doctor recommended against the worker's claim, noting that testing in the work area did not indicate the presence of chemicals that would cause asthma, that methyl ethyl ketone was considered an irritant but not a pulmonary sensitizer and that the worker developed a generalized sensitivity fairly quickly.

The Panel obtained additional evidence from the respirologist who stated that he did not propose that methyl ethyl ketone was the agent responsible for the worker's symptoms but simply that it was the chemical

most evident at the time. People with hyperactive airways may be exposed to a true sensitizing agent and develop asthma which persists even after removal from the work site.

The worker did not have symptoms of asthma prior to commencing work at the gluing station in September 1984. According to the respirologist, there was reasonable probability that the worker would have developed asthma eventually but, in fact, he did not develop it until working in the gluing station. This was supportive of the view that the workplace was a triggering event, even though the mechanism was unclear. Considering the evidence of the respirologist and the Board doctor, the Panel applied the benefit of the doubt in favour of the worker. The appeal was dismissed. [11 pages]

WCAT Decisions Considered: Decision No. 94/87 (1989), 11 W.C.A.T.R. 20; Decision No. 809/88

DECISION NO. 904/88 (13/03/90) Carlan Klym Sutherland

Pensions (assessment) (asbestosis) - Asbestosis - Asthma - Exposure (polyvinyl acetate) - AMA Guides (respiratory impairment).

The worker was an insulator from 1940 to 1983. The Board granted a 10% pension for asbestosis in 1979. However, the Board did not grant temporary benefits for asbestosis nor did it grant benefits for asthma.

The worker was not entitled to benefits for asthma. He used a lagging compound to secure insulation around pipes. However, there were no sensitizing agents in the lagging compound. Further, the worker's condition varied irrespective of exposure to toxins in the workplace.

The worker was not entitled to temporary benefits resulting from his respiratory illness. By the time the worker laid off in 1983, he was no longer capable of regular work and he was not under active medical treatment.

The pension for asbestosis was assessed by the Occupational Chest Disease Review Committee without benchmarks. Recently, the Board adopted the AMA rating schedule for respiratory illness. The Board rejected a recommendation by the Royal Commission on Asbestos to include an automatic award for psychological disability from irreversible and progressive disease.

The Panel assessed the worker's disability against the AMA guidelines adopted by the Board and found that the worker came within Class 2. The Panel awarded a 25% pension, retroactive to 1983. The Panel recommended that the worker be assessed for potential psychiatric entitlement.

The appeal was allowed in part. [18 pages]

WCAT Decisions Considered: 165

Appendices: AMA Guidelines to classes of respiratory impairment.

DECISION NO. 103/90I (13/03/90) Starkman Lebert Jago

Adjournment (addition of representative) - Hearing (attendance of worker).

The worker notified that he did not intend to attend the hearing of the employer's appeal of a decision granting benefits to the worker. The employer requested that the Tribunal subpoena the worker. After being served, the worker indicated that he wanted representation but that his representative would be not available on short notice. An adjournment was granted and the matter rescheduled.

The Panel stated that, just as in worker appeals where the Tribunal insists that the worker appear at the hearing in order to address issues and answer questions, so too in employer appeals regarding entitlement the worker should be present to answer questions with regard to those same issues.

The Panel stated that in every employer appeal involving benefits to the worker, the worker or worker's representative should be advised that the worker's presence is required at the hearing and, if necessary, a subpoena should be issued. [3 pages]

DECISION NO. 934/89L (13/03/90) Hartman Rao Meslin

Leave to appeal (good reason to doubt correctness) (evidence to support Appeal Board conclusion).

The Appeal Board found that the worker was involved in a compensable motor vehicle accident but that he did not suffer any significant injury. There was evidence to support the Appeal Board conclusion. The failure to prefer one medical opinion over that of a Board doctor did not give good reason to doubt the correctness of the decision.

Leave to appeal denied. [6 pages]

DECISION NO. 40/90 (13/03/90) Moore Lebert Apsey

Continuity (of symptoms).

The worker suffered compensable accidents in September 1966 and July 1969. The Board denied benefits subsequent to May 1970.

The worker was entitled to benefits subsequent to May 1970. Although there was a lack of continuity to treatment, medical opinion supported the claim. Further, the Panel accepted the worker's evidence of continuity of symptoms, especially considering that the worker had to give up remunerative work after the 1966 accident and retrain. [7 pages]

DECISION NO. 96/90 (13/03/90) Starkman Lebert Jago

In the course of employment (personal activity) - Evidence (inconsistencies) - Credibility.

The worker was employed to look after gas pumps and to effect minor repairs to the vehicles of the employer's customers. The worker had recently sold his own car. He was injured in 1971 while working on that car, on the employer's premises, at the request of the purchaser.

The worker was not entitled to benefits, as at the time of the accident he was not in the course of his employment. The arrangements between the worker and the purchaser of the vehicle were not in furtherance of the employer's business, but rather were private arrangements. This conclusion was supported by the fact that, following the accident, the purchaser did not ask the employer to complete the work and no payment was ever rendered. There were also contradictions in the worker's evidence as to whether the cost of the work was ever discussed with the purchaser.

At the hearing, a written statement signed by the employer was presented. It stated that the worker had authority to enter into work arrangements such as that agreed to with the purchaser and that the employer had previously attempted to conceal this because the worker was not a licensed mechanic. The Panel was sceptical about this statement which directly contradicted statements made 18 years earlier, in circumstances where the maker of the statements was not present at the hearing to explain the inconsistencies. [10 pages]

DECISION NO. 834R (14/03/90) Moore Lebert Jago

Reconsideration (error of facts).

The worker applied to reconsider Decision No. 834.

The worker submitted that a witness gave false testimony on a particular issue. The Panel noted that the worker's testimony was accepted on this issue in Decision No. 834.

The issue in Decision No. 834 was entitlement to benefits in 1981 for a disability relating to an accident in 1979. There was no reason to consider the employer's treatment of the worker in 1988.

Decision No. 834 found that the worker's neck and shoulder condition did not arise out of the 1979 accident. Therefore, there was no reason to consider entitlement for a permanent neck and shoulder condition.

The application to reconsider was denied. [4 pages]

WCAT Decisions Considered: Decision No. 95R (1989), 11 W.C.A.T.R. 1; Decision Nos. 72R, 72R2, 834

DECISION NO. 86/89 (14/03/90) Kenny Lebert Jewell

Experience rating (CAD-7) - Discretion, Board (experience rating) (standard of review) - Jurisdiction, Tribunal (appealable issue).

The employer appealed CAD-7 surcharges that it was required to pay in 1984 and 1985. The surcharges were based on the years 1981-83 and 1982-84 respectively. The employer submitted that it was penalized twice for its poor accident record in 1982, that the 1982 accident history did not reflect fault on the company's part and that the Board retroactively applied CAD-7.

There was also an issue as to jurisdiction regarding objections to CAD-7. The Panel found that the Tribunal has jurisdiction to review all aspects of the employer's assessment appeal including: application of the CAD-7 formula to the facts of the individual case; whether the plan as a whole conforms to the requirements of the Act; review of individual details of the CAD-7 formula.

The Board has broad discretionary powers regarding assessment policies and the adoption of merit rating systems. Considering this broad discretion and the Board's expertise in this complex area, the Board's decisions should be treated with considerable deference. The systemic perspective (to treat similarly situated employers in a similar manner) is particularly important but does not prevent an employer from challenging particular terms of CAD-7 as applicable to its appeal.

The employer's injury costs were greater than expected injury costs. However, CAD-7 relies on injury frequency as well. The employer's injury frequency was greater than the expected in all four years under consideration. Thus, the 1982 cost record was not entirely responsible for the surcharges.

In considering fault, the issue was whether the Board must consider actual conduct or whether it could consider a statistical calculation of costs and frequency. The Panel found that a merit rating system can be based on a statistical record. An important objective of the system is to distribute costs/risks more equitably. Employers with higher than average accident costs/risks impose a greater burden on the system, regardless of fault.

The CAD-7 system came into effect in 1984. There would be serious questions about the Board's power to retroactively change prior assessments. However, the Panel found that the CAD-7 system was not making a retroactive increase. The system made certain surcharges and rebates payable in 1984. It paid rebates to employers likely to incur lower costs and required surcharges from employers likely to incur higher costs. Although the estimate of the cost risk associated with particular employers was based on past experience, it was, in fact, an estimate of 1984 and future costs.

The appeal was dismissed. [10 pages]

WCAT Decisions Considered: Decision No. 915 (1987), 7 W.C.A.T.R. 1; Decision No. 918/87 (1988), 8 W.C.A.T.R. 197; Decision Nos. 126/87, 86/89

Cases Considered: Bell Canada v. C.R.T.C. (1989), 60 D.L.R. (4th) 682; Wisconsin Compensation Rating & Inspection Bureau v. Mortensen (1938) 277 N.W. 679; Workmen's Compensation Board of New Brunswick v. Cullen Stevedoring Co. Ltd. (1970), 12 D.L.R. (3d) 421

DECISION NO. 41/90 (14/03/90) Moore Lebert Apsey

Delay (onset of symptoms) - Aggravation (preexisting condition) (osteoarthritis).

The worker was struck on the chest by a heavy object and knocked down into a sitting position. Six to eight weeks after the accident, he began to develop back pain. The back condition was diagnosed as osteoarthritis.

The worker was entitled to benefits for the back condition. The accident aggravated the worker's pre-existing asymptomatic condition. The delay in onset of symptoms was explained by the worker's inactivity during the six weeks after the accident and by the pain killing and anti-inflammatory medication that he was taking. [6 pages]

DECISION NO. 37/90 (15/03/90) Bigras Higson Nipshagen

Exposure (1,1,1-trichloroethane) - Medical opinion (environmental hypersensitivity).

A sewing machine operator appealed a decision of the Appeals Adjudicator denying entitlement for a condition which she claimed arose out of exposure to a cleaning fluid, 1,1,1-trichloroethane. The worker suffered skin problems, headaches, ear problems and general aches and pains.

In the period prior to the worker's lay-off, there were several changes in the workplace which brought the worker into more exposure to trichloroethane than previously. Although of undetermined intensity, the exposure was more significant than accepted by the Board.

Medical opinion was divided. Environmental ecologists were of the opinion that exposure to the cleaning fluid could cause the worker's condition but that other allergens could also be found which would explain the worker's condition. Other specialists related the condition to other causes but could not eliminate the possibility of an environmental sensitivity.

A certain diagnosis was not necessary to determine entitlement. On the balance of probabilities, the Panel found that the worker's condition was a disablement resulting from exposure at work. The appeal was allowed. [18 pages]

WCAT Decisions Considered: Decision No. 850 (1988), 8 W.C.A.T.R. 73

DECISION NO. 33/90 (15/03/90) Faubert Higson Nipshagen

Access to worker file, s.77 (issue in dispute).

The issues in dispute were permanent disability and SIEF. Through no fault of the employer, the Board failed to inform the worker of the SIEF issue. The Panel noted the importance of informing the worker of the issue in dispute so that the worker can reasonably exercise his right to object to access.

Therefore, the Panel considered only the issue of permanent disability for purposes of this appeal. Since all documents were relevant to the issue of permanent disability, access to the worker's file was granted to the employer. [5 pages]

WCAT Decisions Considered: Decision No. 704/87 (1987), 6 W.C.A.T.R. 220; Decision Nos. 351/87, 647/89

DECISION NO. 32/90 (15/03/90) Chapnik Klym Meslin

Continuity (of treatment) - Aggravation (preexisting condition) (spondylolisthesis).

The worker suffered back injuries in 1976 and 1977. The worker appealed a decision of the Hearings Officer denying entitlement for a back condition in 1982.

There was a lack of continuity of complaint and treatment after the compensable accidents. The Panel found that the compensable injuries resolved. The condition in 1982 was related to pre-existing spondylolisthesis. [7 pages]

WCAT Decisions Considered: 907/87L

Board Directives and Guidelines: Claims Services Division Manual, s.108(2), p.235, Directive 1

DECISION NO. 745M (15/03/90) Sperdakos MacIsaac Mason (dissenting)

Continuing entitlement.

The worker struck her knee in August 1982 and returned to work within two weeks. The worker was entitled to benefits for lay-offs in 1983 due to her knee disability. One medical report stated that the worker had pre-existing joint space narrowing. However, the majority of the Panel accepted other reports that there was no good evidence that the joint space narrowing truly existed and even if it did, it did not always indicate pre-existing degenerative joint disease. [7 pages]

DECISION NO. 370/89 (15/03/90) Chapnik McCombie Merritt

Accident (occurrence).

The worker claimed to have injured his lower back, shoulder and elbow when he fell off a ladder while removing a tarp from a trailer.

The Panel had serious concerns about reliability of the worker's evidence. He was evasive in answering questions and there were inconsistencies in his own testimony as to whether he was happy with his work and whether he got along with his supervisor. The worker could not explain why doctors at the hospital stated that he was impaired but he denied drinking on the date of the accident. The worker was not entitled to benefits. [8 pages]

WCAT Decisions Considered: Decision Nos. 232, 846

DECISION NO. 72/90 (16/03/90) Onen Robillard Apsey

Administrative Fund (transfer of costs) - Transfer of costs - Apportionment - Case Description - Transcript.

The employer appealed a decision of the Hearings Officer denying a request to transfer costs of an accident to the Administrative Fund. The employer was a subcontractor on a construction site. The worker fell when a ramp slipped. The Hearings Officer also denied a request to transfer costs to the contractor under s.8(9), but the employer did not appeal that decision.

In preliminary matters, the Panel stated that materials submitted by a party in bound format with appropriate identification, pagination and other indicia of adequate preparation should not be altered or amended so that they can be called Case Description Addenda. The Panel also admitted a portion of the

transcript of the Hearings Officer hearing which contained evidence regarding the facts of the accident.

The employer submitted that costs should be transferred to the Administrative Fund due to delay on the part of the Board in investigating the accident, so that facts which could have been discovered are now impossible to find. However, the Panel found that no comprehensive investigation had been carried out and that witnesses and documentary evidence were apparently still available. The Panel could not make a determination on the effect of delay until after investigation regarding s.8(9). It was still open to the employer to appeal regarding transfer of costs under s.8(9).

The appeal was dismissed. [7 pages]

Practice Directions Considered: Practice Direction No. 4 (1989), 8 W.C.A.T.R. 364

Board Directives and Guidelines: Claims Adjudication Branch Procedures Manual, Document No. 33-02-34

DECISION NO. 257/89 (16/03/90) Kenny Cook Seguin

Mining (gold) (raise driller) - Cancer (lung) - Smoking - Causation (cancer) (gold miners) - Medical opinion (cancer) (gold miners) - Board Directives and Guidelines (gold miners) - Exposure (radon) - Industrial Disease Standards Panel (gold miners).

A gold miner appealed a decision of the Hearings Officer denying entitlement for lung cancer. The worker was an underground gold miner who worked as a raise driller from 1949 to 1985. He claimed that his lung cancer was related to exposure to radon daughters in the work environment. The Board rejected the claim since the worker did not work in gold mines prior to 1945 and, therefore, did not meet the criteria in Board policy.

The worker's job as a raise driller exposed him to particularly dusty conditions. Historical dust count levels, although incomplete, indicated that post-1955 dust counts for raise miners were comparable to pre-1955 and even pre-1945 dust counts for a number of other gold mining job categories.

The Panel reviewed epidemiological evidence regarding gold miners. Data showed a statistically greater lung cancer risk for gold miners who started gold mining before 1945. It also showed declining risk over the years but not that there was no increased risk for gold miners who started after 1945.

In examining the Board policy, it was clear that the requirement of pre-1945 gold mining exposure was based on the statistical association found with respect to increased lung cancer risk. The year of starting gold mining was important as a measure of dust exposure since there was greater dust exposure in earlier years. The important factor associated with increased risk of lung cancer from gold mining appeared to be the level of dust exposure rather than the year. Thus, the evidence of an individual gold miner's actual dust exposure may be persuasive that a particular miner's risk was comparable to risks found in groups of pre-1945 gold miners.

The Panel was satisfied that the worker had especially high dust exposure at levels comparable to exposure of pre-1945 gold miners and that this significantly increased the risk of developing lung cancer. The worker smoked a pack of cigarettes a day but quit for 10 years from 1968 to 1978. Studies indicated that the risk of cancer decreased after quitting smoking, suggesting that the risk to the worker of getting cancer from smoking alone was significantly reduced. There may have been some interaction between smoking and the work environment but it was unlikely that the cancer arose from smoking alone.

The Panel found that the worker's employment as a gold miner was a significant cause of the lung cancer.

The appeal was allowed. [28 pages]

Board Directives and Guidelines: Claims Adjudication Branch Procedures Manual, Document nos. 33-13-14, 33-13-20; Compensation of Gold Miners with Lung Cancer, Policy Statement and Guidelines, Board Minute 3, January 8, 1988, p.5216

DECISION NO. 111/90 (16/03/90) Onen Klym Meslin
Clarke v. Cyr

Section 15 application - Worker - Out of province - Jurisdiction, constitutional - Registration of employers - Transportation industry (truck driver).

The defendants in a civil action applied to determine whether the plaintiff's right of action was taken away regarding a motor vehicle accident in Toronto in 1986.

The defendant worker was the driver of a tractor trailer owned by the corporate defendant. The worker had driven exclusively for the corporate defendant since 1981. He received instruction and direction exclusively from the corporate defendant but he was paid by two personnel companies. The Panel found that the worker was employed by the corporate defendant, not the personnel companies. The ongoing relationship was with the corporate defendant. The personnel companies provided a payroll service but there was no relationship between them and the worker other than the pay, and even that was at the direction of the corporate defendant.

The corporate defendant did not report to the Board. However, the transportation industry was an industry covered in Schedule 1. The worker regularly drove between Toronto and Montreal. The corporate defendant was a Schedule 1 employer for purposes of s.8(9).

Although the worker was a resident of Quebec, he was working in Ontario and subject to its laws. There was a substantial connection with Ontario.

Since the defendant worker was a worker of a Schedule 1 employer, the plaintiff's right of action was taken away against both defendants. [14 pages]

WCAT Decisions Considered: Decision No. 46/87 (1987), 4 W.C.A.T.R. 319; Decision No. 395

Regulations Considered: Reg. 951, Schedule 1 class 20

Board Directives and Guidelines: Employer Assessment Policies Manual, Document no. 02-02-01

Cases Considered: *British Airways Board v. W.C.B.* (1985), 17 D.L.R. (4th) 36; *The Queen in the right of Manitoba v. Air Canada*, [1980] 2 S.C.R. 303

DECISION NO. 170/90 (16/03/90) Strachan Cook Apsey
Tokhasepyan v. Gower

Section 15 application - Executive officers - Personal coverage - Worker - Statutory interpretation (principles of) (ambiguity) - Corporation (piercing corporate veil) - Merits and justice.

The defendants in a court action sought a declaration that the right of the plaintiff to bring the action was taken away by s.8(9) of the Act.

The plaintiff was a bona fide officer, director and 50% shareholder of T Ltd; her husband was the only other shareholder. T Ltd owned two distinct businesses, one of which was L Co, a dry cleaning plant that carried on activities falling within Schedule 1. The plaintiff was the directing mind of L Co, but also performed tasks normally associated with a "worker" as defined by the Act. She was performing such tasks when her vehicle was struck by a vehicle driven by one of the defendants, the worker of a Schedule 1 employer, who was also in the course of his employment.

The plaintiff was a "hybrid" executive officer, typical of many small businesses, who performed activities normally associated with an executive officer, as well as activities normally associated with a worker. The key question was which status should prevail. The defendant argued that the plaintiff's worker-type activities should be sufficient to bring her within the definition of "worker" under the Act.

The Ontario compensation system is founded on a historical trade-off pursuant to which workers acquired the right to no-fault benefits for work injuries in return for surrendering the right to sue employers and other workers. The legislators chose to exclude executive officers from automatic coverage for compensation

benefits. To ensure entitlement to benefits, executive officers must exercise an option under s.11(1). By opting for personal coverage under s.11, an executive officer is surrendering a right in return for coverage. It is an individual version of the historical trade-off.

Despite the broadness of the definition of worker under s.1(1)(z), it is clear that someone who is classified as a legitimate executive officer was intended to be excluded. Once it is established that the classification as an executive officer is legitimate, the focus on a person's actual activity should stop and the person should not be stripped of the benefits or burdens of that classification, unless that person so elects under s.11. An executive officer who performs duties normally performed by a worker remains an executive officer.

The defendant argued that the words "any executive officer or any director" should be read into s.8(9) so as to take away the right of an executive officer to sue in the circumstances of this case. The Panel did not agree that the legislation was ambiguous and resulted in an interpretation that was inconsistent with the legislative intent. Absent any ambiguity, a court or tribunal has limited power to alter the wording of a statute by way of interpretation, unless a plain reading renders the legislation unintelligible, unreasonable, unworkable or totally irreconcilable with the intention of the Act.

Accordingly, the words of s.8(9) should be given their plain meaning. Until the executive officer surrenders the right to sue by means of a s.11 election, the executive officer retains a right of action. Subsection 8(9) is not necessarily inconsistent with the overall intent of the statute which provides an option for executive officers. Until executive officers are included in the no-fault benefit plan, s.8(9) is open to the interpretation that the right of action of an executive officer has not been taken away until the injury sustained is one "for which benefits are payable under the Act".

This was not a case where the real merits and justice of the case required the lifting of the corporate veil to avoid a result too flagrantly opposed to justice or convenience. The executive officer's remedy exercised in this case (i.e. the right to sue) is one that appears to be contemplated under the option approach afforded executive officers. [24 pages]

WCAT Decisions Considered: Decision No. 51 (1987), 4 W.C.A.T.R. 67; Decision No. 516 (1987), 4 W.C.A.T.R. 210; Decision No. 337/88 (1988), 10 W.C.A.T.R. 182; Decision Nos. 525, 675/88
Other Statutes Considered: Interpretation Act, R.S.O. 1980 c. 219, s.10
Board Directives and Guidelines: Operation Policy Manual, Document no. 08-02-03
Cases Considered: Constitution Insurance Co. of Canada et al. v. Kosmopolous et al. (1987), 34 D.L.R. (4th) 208 (S.C.C.); Meyer et al. v. Workers' Compensation Board et al. (1986), 15 O.A.C. 202 (Ont. Div. Ct.)

DECISION NO. 71/90 (20/03/90) Starkman McCombie Nipshagen

Investigation by Tribunal - Delay (treatment).

The worker suffered severe internal injuries in a compensable accident in 1976 when his automobile struck a train. The worker was not entitled to benefits for a left shoulder condition, considering delay in seeking treatment until 1984, lack of complaint and lack of a firm diagnosis relating the shoulder condition to the accident.

The Tribunal has jurisdiction to conduct further investigations when necessary. The Panel proposed that further investigations should only be undertaken when the facts presented to the Tribunal indicate that there is a prima facie reason to conduct such investigations. If there is not any prima facie reason to believe that further investigation will confirm or deny facts which are germane to the resolution of the appeal, then such investigation should not be undertaken. Indicia to consider in determining whether there is prima facie reason to investigate further include: nature of the claim; whether parties are represented and nature of representation; nature of evidence available; nature and extent of investigations by the Board; whether, in the Panel's opinion, further investigation is likely to bring out relevant facts which will be of assistance to the Panel in resolving the dispute.

In this case, further investigation was not required. [8 pages]

DECISION NO. 16/90 (20/03/90) Moore Higson Preston

Worker (contract of service) (spouse).

The employer appealed a decision of the Hearings Officer assessing the employer on earnings paid to his wife. The employer was a sole proprietorship operating out of the owner's house. The owner's wife was paid on a periodic basis, the amount depending on the amount of work she performed and the amount of money available. The owner submitted that he should not be assessed on the wife's earnings since she performed tasks pursuant to a personal relationship rather than a business relationship.

There was a link between the remuneration paid and the work performed. There was no reason to conclude that a person's legal position could be altered by virtue of the fact that he or she was a spouse. The appeal was dismissed. [6 pages]

WCAT Decisions Considered: 577

Board Directives and Guidelines: Claims Services Division Manual, s.1(1)(z), p.19, Directive 1

DECISION NO. 173/90 (21/03/90) Kenny Higson Jago

Pensions (assessment) (hand).

The worker suffered a hand injury for which he was awarded a 2% pension. The worker's grip strength was somewhat reduced. Comparing the worker's disability to the Rating Schedule, the Panel found that the 2% rating was correct. [5 pages]

DECISION NO. 551/89 (21/03/90) Hartman Higson Preston

Parker v. Chamilliard; Parker v. Wyatt

Section 15 application (auto insurance) - Supplier of motor vehicle, machinery or equipment - Jurisdiction, Tribunal (section 15) (dependants).

The plaintiffs and defendant driver were all workers of the same employer and were in the course of employment at the time of a motor vehicle accident. The driver was driving a vehicle leased from the defendant leasing company.

The right of action against the defendant driver was taken away. The right of action against a car dealership that was not the owner of the vehicle was not taken away. The right of action against the defendant leasing company, which owned the vehicle being driven by the defendant driver, was not taken away, but the leasing company would be liable only for fault or negligence attributed to it directly.

The Tribunal did not have jurisdiction regarding the action of the plaintiff's family members, since they were not dependants within the meaning of the Act.

The fact that the defendants were covered by compulsory auto insurance was not a matter that the Tribunal could consider. [8 pages]

WCAT Decisions Considered: Decision No. 725 (1987), 4 W.C.A.T.R. 266

Other Statutes Considered: Family Law Act, 1986, S.O. 1986 c.4; Insurance Act, R.S.O. c.219, s.226

DECISION NO. 2/90 (21/03/90) Chapnik Fox Jago

Commutation (home purchase).

The worker appealed a decision of the Hearings Officer denying commutation of the worker's pension, valued at about \$73,000, for the purpose of purchasing a home.

The worker wanted the commutation essentially for financial reasons, believing that his rental payments would be better spent towards purchasing a home. However, there was no evidence that the commutation would reduce the effects of his disability or that his financial situation was producing a disability.

The worker did not meet the requirements of the Board's Guidelines. Further, the commutation would not be in the worker's best interests since his employment history was sporadic and he had not managed his finances well in the past. The appeal was dismissed. [9 pages]

WCAT Decisions Considered: Decision No. 16 (1986), 1 W.C.A.T.R. 62; Decision Nos. 109, 364, 406/87, 979/87
Board Directives and Guidelines: Vocational Rehabilitation Division Manual, Document no. 04-01-03;
Commutation of Pensions Policy, Board Minute 4, April 3, 1987, p.5186; Guidelines for the Commutation of Pensions, January 15, 1988; Guidelines for the Commutation of Pensions, Board Minute 3, March 20, 1989, p.71

DECISION NO. 183/90 (21/03/90) Kenny Fox Jago

Access to worker file, s.77.

Access to the worker's file was granted to the employer. [4 pages]

DECISION NO. 115/90I (21/03/90) Starkman Lebert Jago

Adjournment (admission of evidence) - Three week rule - Evidence (admissibility) (Board decision).

The worker objected to admission of an addendum to the Case Description because it was not served on him in compliance with the three week rule and because of the amount of material involved. The addendum contained over 200 pages and indicated that the employer intended to call five witnesses. The employer had not participated in the hearing before the Hearings Officer. In the circumstances, an adjournment was granted.

The employer objected to introduction into evidence of a Board decision dealing with a claim of a different worker. The Panel admitted the decision. Tribunals are not bound by rules of evidence that apply to court proceedings. The employer's objections went to the question of weight to be attached to the decision. [6 pages]

WCAT Decisions Considered: Decision No. 570 (1987), 4 W.C.A.T.R. 245

**DECISION NO. 1000/89 (21/03/90) Hartman McCombie Clarke
Grix v. Parmar**

Section 15 application - In the course of employment (lunch) - Jurisdiction, Tribunal (section 15) (dependants) - Election - Subrogation.

The worker was injured during her unpaid lunch break when she was struck by a delivery van while

crossing the employer's parking lot to go to a catering truck. The Panel found that the worker was in the course of employment.

The worker's right of action was taken away against the driver of the delivery truck. The right of action was not taken away against the owner of the delivery truck, due to s.8(10), but the right to recover damages was limited by s.8(11).

The Panel did not have jurisdiction regarding the action of a family member of the worker since he did not come within the definition of dependant in the Act. A dependant's rights are triggered by the death of the worker. The words "who but for the incapacity due to the accident would have been so dependent" in s.1(1)(f) were included in order not to exclude situations where a worker was injured, incapacitated and therefore no longer in receipt of earnings at the time of his death.

The worker elected to receive benefits and later brought an action. The Board was subrogated to the rights of the worker and may maintain the action in her name. [10 pages]

WCAT Decisions Considered: Decision No. 150 (1986), 1 W.C.A.T.R. 201; Decision No. 229 (1986), 2 W.C.A.T.R. 118; Decision No. 725 (1987), 4 W.C.A.T.R. 266; Decision No. 1001/87 (1988), 8 W.C.A.T.R. 239; Decision No. 1123/87 (1988), 8 W.C.A.T.R. 274; Decision No. 263/88 (1989), 10 W.C.A.T.R. 152; Decision No. 432/88 (1988), 9 W.C.A.T.R. 306; Decision Nos. 373, 553, 83/87, 597/87, 323/88, 253/89

Other Statutes Considered: Family Law Act, 1986, S.O. 1986 c.4

Board Directives and Guidelines: Claims Adjudication Branch Procedures Manual, Document no. 33-14-01

DECISION NO. 622/89I (22/03/90) Sperdakos Robillard Meslin
Kimsto v. Papaleo

Section 15 application - In the course of employment (travelling) - In the course of employment (takes self out of employment) (dangerous driving).

The defendant in a civil action was driving his vehicle on the grounds of a hospital when he struck the plaintiff. The defendant's employer was installing a computer system at the hospital and the defendant was assigned by the employer to work at the hospital. At the time of the accident, the defendant had attended a morning meeting at the hospital and was returning to his employer's offices to finish a report in preparation for an afternoon meeting. The Panel found that the worker was in the course of employment.

The defendant was convicted of dangerous driving as a result of the accident. This conduct did not take him out of the course of employment. Section 3(7) applied only where the person guilty of the misconduct was also an injured worker who would otherwise be eligible for compensation himself. In any event, the defendant's behaviour may have been negligent but it was not wilful.

The plaintiff's right of action was taken away. The Panel would receive further submissions regarding the action of the plaintiff's wife. [13 pages]

WCAT Decisions Considered: Decision No. 229 (1986), 2 W.C.A.T.R. 118; Decision Nos. 313, 414, 217/88
Board Directives and Guidelines: Claims Services Division Manual, s.3(1), p.47, Directive 21

DECISION NO. 877/89 (22/03/90) Steward Heard Howes

Aggravation (compensable injury).

The worker suffered a compensable back injury in 1971, possibly including a herniated disc at L4-5, for which he was awarded a 15% pension. He suffered a further back injury in 1979, for which he was awarded an additional 10% pension. On the evidence, the worker continued to be disabled beyond his pension level subsequent to April 1985. The 1979 accident was a significant contributing factor to the worker's

disability. Even if the worker did suffer a herniated disc in the 1971 accident, his condition was relatively stable prior to the 1979 accident. However, after the 1979 accident, his condition was significantly worse. [9 pages]

DECISION NO. 522/88L (22/03/90) Strachan Lebert Jago

Jurisdiction, Tribunal (leave to appeal).

The worker applied for leave to appeal a decision of the Appeal Board denying temporary total disability benefits subsequent to February 1983 and refusing to authorize magnetic field therapy treatment.

There was indication in literature before the Appeal Board that magnetic field therapy treatment should be kept away from the pelvis and spine, which were the precise areas where it might be used on the worker.

Medical reports indicated a possibility that chronic pain may have emerged. Leave to appeal was not required on chronic pain. The Panel directed that the Board assess the worker to determine the existence of chronic pain. [5 pages]

DECISION NO. 981/87R (23/03/90) Ellis Lebert Nipshagen

Reconsideration (jurisdictional error) - Reconsideration (error of law).

The employer applied to reconsider Decision No. 981/87, in which it was found that the Tribunal could make a determination under s.21 even if there was a conflict with provisions of a collective agreement.

The employer raised jurisdictional grounds for the application for reconsideration, submitting that s.21 of the Act did not apply to a federal agency.

Decision No. 72R2 suggested that a clear jurisdictional error, i.e., an error that would be corrected by the Divisional Court on a judicial review application, should be regarded as sufficient grounds for the Tribunal to find it advisable to reconsider. In such circumstances, the public interest of avoiding unnecessary court proceedings would override the interest in finality of decisions.

The Panel found that the standard for determining whether an error would be corrected by the Divisional Court was whether it was more probable than not that a judicial review application would be successful.

In this case, the jurisdictional arguments were not raised at the original hearing but this would not change the criteria for reconsideration. The same employer did raise similar jurisdictional arguments in Decision No. 696/88. That decision is the subject of a pending judicial review application. The existence of an active judicial review application should not be cause to refuse to reconsider. The interests of avoiding unnecessary litigation should supersede other considerations. The Panel concluded that the jurisdictional questions were not adequate grounds for reconsideration.

The application was based, alternatively, on submissions that Decision No. 981/87 erred in interpretation of the Act and in certain conclusions on the facts. For such grounds, it would not be advisable to reconsider unless the Panel was of the view that the error and its effects were exceptional enough, when balanced against considerations of finality and prejudice, to warrant such a step.

In this case, it was not advisable to reconsider. The application was denied. [6 pages]

WCAT Decisions Considered: Decision No. 696/88 (1989), 10 W.C.A.T.R. 308; Decision Nos. 72R2, 981/87

DECISION NO. 97/90 (23/03/90) Starkman Lebert Jago

Pensions (assessment) (back).

The worker suffered a back injury for which he was awarded a 10% pension. On the evidence, the worker's condition had reached maximal medical rehabilitation when the pension was awarded. Comparing the worker's condition to the benchmarks of the Rating Schedule, there was no reason to interfere with the 10% rating. [7 pages]

DECISION NO. 167/90 (23/03/90) Strachan Robillard Nipshagen

Access to worker file, s.77.

Access to the worker's file was granted to the employer. [3 pages]

DECISION NO. 850/87R (23/03/90) Ellis Lebert Nipshagen

Reconsideration (jurisdictional error) - Reconsideration (error of law).

The employer applied to reconsider Decision No. 850/87, in which it was found that the Tribunal could make a determination under s.21 even if there was a conflict with provisions of a collective agreement.

The employer raised jurisdictional grounds for the application for reconsideration, submitting that s.21 of the Act did not apply to a federal agency.

Decision No. 72R2 suggested that a clear jurisdictional error, i.e., an error that would be corrected by the Divisional Court on a judicial review application, should be regarded as sufficient grounds for the Tribunal to find it advisable to reconsider. In such circumstances, the public interest of avoiding unnecessary court proceedings would override the interest in finality of decisions.

The Panel found that the standard for determining whether an error would be corrected by the Divisional Court was whether it was more probable than not that a judicial review application would be successful.

In this case, the jurisdictional arguments were not raised at the original hearing but this would not change the criteria for reconsideration. The same employer did raise similar jurisdictional arguments in Decision No. 696/88. That decision is the subject of a pending judicial review application. The existence of an active judicial review application should not be cause to refuse to reconsider. The interests of avoiding unnecessary litigation should supersede other considerations. The Panel concluded that the jurisdictional questions were not adequate grounds for reconsideration.

The application was based, alternatively, on submissions that Decision No. 850/87 erred in interpretation of the Act and in certain conclusions on the facts. For such grounds, it would not be advisable to reconsider unless the Panel was of the view that the error and its effects were exceptional enough, when balanced against considerations of finality and prejudice, to warrant such a step.

In this case, it was not advisable to reconsider. The application was denied. [6 pages]

WCAT Decisions Considered: Decision No. 696/88 (1989), 10 W.C.A.T.R. 308; Decision Nos. 72R2, 981/87

DECISION NO. 400/89 (23/03/90) Hartman Lankin Meslin

Aggravation (preexisting condition) (disc degeneration).

The worker suffered a back injury in October 1986. The worker was entitled to benefits for a lay-off in

May 1987. On the evidence, the worker was temporarily partially disabled by an aggravation of a pre-existing degenerative condition. [8 pages]

DECISION NO. 184/90 (23/03/90) Kenny Drennan Nipshagen

Preexisting condition (synovial plica).

In January 1988, the worker experienced pain and locking of his left knee. In March 1988, the worker underwent surgery for removal of synovial plica.

The worker was not entitled to benefits for the surgery. Considering the medical evidence, the surgery was required as a result of a preexisting condition. The work activity in January may have caused a temporary aggravation of the underlying condition but did not cause or hasten the formation of the plica. [4 pages]

DECISION NO. 156/90 (23/03/90) Bigras Robillard Seguin

Commutation (business investment) - Pensions (lump sum) (10% pension).

The worker was a cutter who suffered a back injury for which he was awarded a 10% pension. The worker was entitled to a commutation of his pension, valued at about \$35,000, for the purpose of purchasing a skidder.

The worker was continuing to work as a cutter, at reduced production, even though the work was not within his medical restrictions. The commutation would allow him to continue working in forest operations in a job more suited to his condition. There was a valid rehabilitative purpose to the commutation. Although it might be possible for the worker to mortgage his home to purchase the skidder, he should not be required to do so.

At the time the pension was awarded in 1987, it was indicated that the worker's condition might deteriorate and that, therefore, payment in a lump sum might jeopardize the worker's future financial well-being. However, the worker's condition does not appear to have deteriorated.

The worker qualified for the commutation under either s.26(1) or s.45(4). [7 pages]

WCAT Decisions Considered: Decision No. 569/88 (1988), 9 W.C.A.T.R. 342

Board Directives and Guidelines: Vocational Rehabilitation Division Manual, Document no. 01-01-01;

Commutation of Pensions Policy, Board Minute 4, April 3, 1987, p.5186; Guidelines for the Commutation of Pensions, Board Minute 3, March 20, 1989, p.71

DECISION NO. 795/89L (23/03/90) Starkman Jackson Sutherland

Psychotraumatic disability - Chronic pain - Pensions (assessment) (psychotraumatic disability) - Pensions (whole person concept) - Pensions (stacking) - Leave to appeal (substantial new evidence) (medical report) - Issue setting.

A baker suffered a low back strain in 1974. He applied for leave to appeal a decision of the Appeal Board denying entitlement for organic disability subsequent to February 1976. He also appealed Hearings Officer decisions denying an increase in a 25% pension for psychotraumatic disability and denying entitlement for chronic pain.

Applying the whole person concept, the Panel considered the leave application and the appeals together. It also declined to allow the worker to withdraw the chronic pain issue.

The examining physicians had been unable to find or confirm an organic basis for the worker's ongoing problems. Most of the reports suggested that the problems resulted from post-traumatic neurosis or chronic pain. Leave to appeal was denied.

On the evidence, the Board correctly assessed the worker's permanent psychiatric disability as moderate and assigned a 25% rating, which was the maximum allowed under the Board guidelines for moderate impairment.

It was difficult, if not impossible, to make a determination of the proper characterization of the worker's pain. Board guidelines provide for using a holistic approach to rating permanent disabilities. No effort should be made to distinguish the cause of the worker's pain as being from organic, non-organic or psychiatric sources. It is, therefore, not correct to say that the worker is not entitled to a chronic pain pension because the pain he is experiencing is from a psychiatric cause for which he has already been compensated by way of a permanent pension.

The correct question is what is the impairment of earning capacity of the worker taking into account all of his compensable disabilities. In considering impairment of earning capacity, the Panel considered the effect of the pain on the activities of daily living of the average worker. In this case, the Panel was satisfied that the worker's 25% pension correctly reflected the worker's impairment of earning capacity.

The appeals were dismissed. [22 pages]

WCAT Decisions Considered: 638/89]

Board Directives and Guidelines: Chronic Pain Disorder Policy, Board Minute 2, July 3, 1987, p.5196;

Guidelines for the Interim Chronic Pain Disorder Policy, Board Minute 1, May 2, 1989, p.74

DECISION NO. 135/90 (26/03/90) Carlan Robillard Nipshagen

Pensions (assessment) (white finger disease) - Pensions (assessment) (enhancement factor) - AMA Guides (peripheral vascular disease).

A miner was awarded a 5% pension in 1979 for white finger disease. He appealed a decision of the Hearings Officer denying an increase in the pension.

The worker had a severe disability in his hands. He had virtually no fine motor control and no ability to do detailed work with his hands. These problems were severely exacerbated by exposure to any cold.

In the absence of Board guidelines to rate such disabilities, the Panel decided to rate the pension itself. The Panel considered the AMA guidelines for vascular disease. The worker would have been judged to have a 70% impairment of the upper body, which would result in a 42% impairment of the whole body. The Panel also considered Board guidelines which recommended a 35% pension for amputation of all four fingers.

The Panel found that the worker's disability should be considered the equivalent of half the disability to someone with amputated fingers. This represented a 17.5% pension for each hand, or 35% overall. In addition, the worker was entitled to a multiple factor of 8.75%, being half the value of the lesser disability. This came to a total of 44%, retroactive to October 1984. From 1979 to 1984, the condition was not as severe and the worker was entitled to a 10% pension for each hand with a 5% multiple factor, for a total of 25%. [10 pages].

WCAT Decisions Considered: Decision No. 915 (1987), 7 W.C.A.T.R. 1; Decision No. 275/89] Appendices: AMA Guidelines to classes of impairment due to peripheral vascular disease

DECISION NO. 80/90 (26/03/90) Starkman Klym Jago*Pensions (assessment) (knee).*

The worker appealed a decision of the Appeals Adjudicator confirming a 17.5% pension for bilateral knee disabilities. The worker was awarded a 10% pension for the left knee, a 5% pension for the right knee and a 2.5% multiple factor.

Considering the medical reports, the worker had greater problems with the left knee than with the right knee and it was appropriate for the worker to receive a greater pension for the left knee.

For organic soft tissue injuries for which there is a benchmark in the Rating Schedule, panels appear to ask whether it has been demonstrated that the Board erred in its determination of the correct pension level. The benchmark for an immobile knee is 25%. It was possible to say that the worker's level of disability was higher than recognized by the Board. However, recognizing the difficulty of non-Board personnel determining pension ratings for soft tissue injuries, the Panel was not satisfied that there was a demonstrable error by the Board.

The last assessment on which the Appeals Adjudicator decision was based, was in 1985. The Panel should not consider subsequent medical evidence to determine if there was deterioration since 1985. If only Board pension examiners are qualified to set pension levels in accordance with the Rating Schedule for soft tissue injuries, then it is only appropriate for the Panel to consider the correct pension level as of the date of the pension examination at the Board. [10 pages]

WCAT Decisions Considered: Decision No. 915 (1987), 7 W.C.A.T.R. 1

DECISION NO. 253/87R (28/03/90) Bradbury Cook Apsey*Reconsideration (procedural error) - Delay (onset of symptoms) - Preexisting condition (osteoarthritis).*

The Tribunal decided to reconsider Decision No. 253/87 on its own motion. The decision was a preliminary draft that had been released in error.

The worker suffered back injuries in 1964 and 1967. In 1984, the worker underwent a right hip replacement.

The worker was not entitled to benefits for the hip condition. The worker did not injure his hip in the compensable accidents and there was a delay in onset of hip symptoms until 1970. Considering the medical evidence, the Panel found that the hip condition was a result of underlying non-compensable osteoarthritis and that the compensable accidents were not a significant contributing factor. [11 pages]

WCAT Decisions Considered: Decision No. 180 (1987), 6 W.C.A.T.R. 27

DECISION NO. 208/90I (28/03/90) Kenny Cook Preston*Notice of hearing.*

A company providing bus transportation appealed a decision of the Hearings Officer finding that owner/operators, who did not employ help or employed casual help only, were workers under the Act.

Considering the interest of the owner/operators and the company's consent to giving notice to the owner/operators, the Panel decided that notice of the hearing should be given to the owner/operators. It would be desirable for the owner/operators wanting to participate to join together to retain a representative.

This decision with respect to notice is not a decision with respect to who will be given standing at the hearing or how they will be allowed to participate. [4 pages]

DECISION NO. 58/90 (29/03/90) Marcotte Lebert Apsey

Accident (occurrence) - Delay (claim).

A nursing assistant claimed that she suffered a back injury in 1977 while moving a corpse. The worker was not entitled to benefits for her back condition. There was a delay in claiming benefits until 1985. There was no reference in early medical reports to a specific incident. The worker could not identify three witnesses to the accident. The person to whom the worker said she reported the incident was not in the hospital on the day in question. [8 pages]

DECISION NO. 179/90 (29/03/90) Carlan Ferrari Meslin

Arising out of employment (parking lots) - Arising out of employment (instrument of added peril).

The worker had an accident while driving his motorcycle to a parking spot in an unpaved section of the employer's parking lot.

It was accepted that the accident occurred in the course of employment. The Panel found that the accident arose out of employment. The area in which the worker was parking was not prohibited. Although unpaved, it was commonly used. The Panel approved of Decision No. 674/89, in which it was stated that use of an automobile did not, in and of itself, lead to a conclusion that the accident did not arise out of employment. The worker was entitled to benefits. [6 pages]

WCAT Decision Considered: 674/89

Board Directives and Guidelines: Claims Services Division Manual, s.3(1), p.47, Directive 21

DECISION NO. 140/90 (29/03/90) Starkman McCombie Apsey

Supplements, temporary - Canada Pension Plan - Rehabilitation, vocational (cooperation) - Board Directives and Guidelines (retroactivity) - Temporary disability (beyond pension level).

The issues were the worker's entitlement to supplementary benefits during the period from August to September 1983 and his entitlement to temporary disability benefits from November 1983 to November 1984.

The worker, a drywall installer, injured his low back in April 1980. In January 1982 he was awarded a 15% pension for his organic disability, which was increased to 25%, effective July 1984. The worker was awarded a 10% provisional pension for psychiatric disability, effective April 1982. Therefore, from November 1983 to June 1984 the worker received a 25% pension and from July 1984 to November 1984 he received a 35% pension.

In August 1983 the worker returned from a vacation recommended by his doctor. Since the worker returned to his pre-accident employment in September 1983, the Panel was satisfied that he was cooperating with vocational rehabilitation. The fact that he was receiving Canada Pension Plan benefits did not disqualify him from receiving supplementary benefits. Nothing in the Act provided for such automatic disentitlement. The Board's policy of automatic disentitlement, that was in effect prior to July 1985, was not in conformity with the Act. The Board's subsequent policy, which did not provide for automatic disentitlement, was made retroactive and covered the period in question in this case. The worker was entitled to supplementary benefits from August to September 1983.

The worker re-injured his back at work in September 1983. The Panel was satisfied that from November 1983 to November 1984 the worker was experiencing greater pain than prior to his return to work, and his disability was greater than 25% or 35%. However, the medical evidence did not indicate that the worker was totally disabled. On the evidence, the worker was not actively seeking employment and not cooperating with vocational rehabilitation. He was thus only entitled to 50% temporary disability benefits for this period. [12 pages]

WCAT Decisions Considered: Final Decision No. 2 (1987), 4 W.C.A.T.R. 1

Board Directives and Guidelines: Claims Services Division Manual, s.40(2)(b), p.105, Directive 1; Policy, Retroactivity, Board Minute #6, Oct. 2, 1987, p.5208

DECISION NO. 891/89 (29/03/90) McGrath Cook Preston

Accident (occurrence) - Delay (claim).

The worker, a meatcutter, claimed that he suffered an injury in May 1980. He laid off work in June 1980 and underwent surgery to correct a disc protrusion.

The worker sought medical attention in June 1980. To one doctor he reported a lifting and twisting accident, without mentioning work. To another doctor, he reported that he experienced pain at work, but there was no mention of an accident. The employer stated that the worker had reported injuring his back while lifting and the employer assumed this happened at work. These statements reflected reporting shortly after the alleged accident. Taken in their totality, they confirmed a lifting accident at work.

The worker did not file a claim with the Board until December 1984. The Panel accepted that he knew nothing about workers' compensation until his wife learned about it through her new position at her work. The lack of intention to file a claim explained the lack of precise reporting. The employer failed to file a claim with the Board as he went bankrupt around the time the worker entered the hospital. The worker was entitled to benefits. [7 pages]

DECISION NO. 163/90 (30/03/90) Signoroni Lebert Seguin

Withdrawal (of appeal).

The worker was appealing a decision of the Hearings Officer denying entitlement for psychotraumatic disability. The last report from the worker's psychiatrist was dated in 1985. Further medical information was needed. The Panel noted that a report from the treating psychiatrist could well disturb the therapeutic relationship in place since 1983.

The worker was allowed to withdraw the appeal without prejudice. [5 pages]

DECISION NO. 201/90 (30/03/90) Strachan Cook Apsey

Disablement (change in work).

The employer appealed a decision of the Hearings Officer granting the worker benefits for disablement. The worker had been an assembly line packer for 22 years when he was switched to the box department. After five months, the worker developed tendonitis of the right wrist.

The worker was entitled to benefits, considering the onset of symptoms within a reasonable period after the change in work, the heavy nature of the work involving the use of air hammers and the gradual disappearance of the disability during the period of lay-off. The appeal was dismissed. [6 pages]

DECISION NO. 221/90 (02/04/90) Strachan Lebert Meslin

Access to worker file, s.77.

Access to the worker's file was granted to the employer. [3 pages]

DECISION NO. 222/90 (02/04/90) Strachan Lebert Meslin

Access to worker file, s.77.

Access to the worker's file was granted to the employer, except for one minor deletion. [3 pages]

DECISION NO. 220/90 (02/04/90) Strachan Lebert Meslin

Access to worker file, s.77.

Access to the worker's file was granted to the employer. [3 pages]

DECISION NO. 300/89 (02/04/90) Onen Cook Jewell

Aggravation (preexisting condition) - Medical opinion (osteoarthritis).

The worker appealed a decision of the Hearings Officer denying entitlement for right shoulder and left knee disabilities.

The worker was entitled to benefits for the shoulder condition. Compensable accidents in 1972 and 1984 aggravated a preexisting asymptomatic degenerative condition.

The worker was entitled to benefits for the knee condition. It was impossible to know definitively whether the arthritic condition was caused by trauma. The worker began to experience symptoms intermittently after an accident in 1975, with gradual deterioration. The Panel found that the accident aggravated a preexisting asymptomatic condition. [11 pages]

**DECISION NO. 52/90 (02/04/90) Chapnik Robillard Meslin
Bluett v. Gulizia**

Section 15 application - In the course of employment (proceeding to and from work).

The plaintiff drove a company truck to the company premises in the morning. The truck was provided to the plaintiff pursuant to an arrangement in which the plaintiff would unlock the gate at the company premises. The worker then proceeded to follow another vehicle of the company to the job site. An accident occurred on the way to the job site.

The Panel found that the plaintiff was in the course of employment at the time of the accident, considering that the plaintiff was driving a company truck, the plaintiff was performing a benefit to the employer by unlocking the gate and the plaintiff received consideration for this effort by being given use of a company truck to travel to and from work. Although the plaintiff was not required to drive the company truck, the overall character of the activity had an employment flavour.

The Panel also noted that it saw no reason to divide the plaintiff's travel time and found that he was within the scope of employment from the time he left his home in the morning.

The plaintiff's right of action was taken away. [12 pages]

WCAT Decisions Considered: Decision No. 229 (1986), 2 W.C.A.T.R. 118; Decision Nos. 313, 414, 869, 228/87, 287/89, 561/89

Board Directives and Guidelines: Claims Adjudication Branch Procedures Manual, Document no. 33-14-03

Cases Considered: Decision No. 2 (1973), 1 B.C.W.C.R. 7

DECISION NO. 172/90 (02/04/90) Onen McCombie Schuel

Hearing loss - Meniere's disease.

The worker appealed a decision of the Hearings Officer denying entitlement for hearing loss. It was accepted that the worker had sufficient noise exposure from employment that he could have suffered loss of hearing.

The worker suffered from Meniere's disease. Some doctors were of the opinion that the hearing loss could also have been caused by noise exposure. However, the preponderance of evidence supported a finding that the hearing loss was attributable to Meniere's disease. The appeal was dismissed. [8 pages]

DECISION NO. 773M (03/04/90) Moore Lebert Clarke

Continuing entitlement.

The worker suffered a compensable back injury in 1973, for which he underwent a discectomy at L4-5. In 1981, the worker underwent a discectomy at L5-S1.

The worker was entitled to benefit in 1981. The medical evidence was clearly supportive of a relationship between the back condition in 1981 and the compensable accident. [7 pages]

WCAT Decisions Considered: 773, 773R

DECISION NO. 202/90 (03/04/90) Signoroni Fox Preston

Access to worker file, s.77.

Access to the worker's file was granted to the employer. [3 pages]

DECISION NO. 205/90 (03/04/90) Signoroni Fox Preston

Access to worker file, s.77.

Access to the worker's file was granted to the employer. [3 pages]

DECISION NO. 204/90 (03/04/90) Signoroni Fox Preston

Access to worker file, s.77.

Access to the worker's file was granted to the employer. [3 pages]

DECISION NO. 193/90 (03/04/90) Onen Rao Meslin

Access to worker file, s.77.

Access to the worker's file was granted to the employer. [3 pages]

DECISION NO. 194/90 (03/04/90) Onen Rao Meslin

Access to worker file, s.77.

Access to the worker's file was granted to the employer. [3 pages]

DECISION NO. 186/90I (03/04/90) Starkman Cook Sutherland

Adjournment (addition of representative).

The employer was appealing a decision granting entitlement to the worker.

The worker requested an adjournment. There had been some delay in the worker receiving the Case Description since she had moved. She had obtained a representative but she had moved again and also had lost confidence in that representative. She obtained a new representative two weeks before the hearing but that representative had not had time to prepare.

The adjournment was granted. [4 pages]

DECISION NO. 192/90 (03/04/90) Onen Rao Meslin

Jurisdiction, Board (section 77) - Jurisdiction, Tribunal (section 77).

In the worker's absence and without being able to contact the worker, the worker's representative objected to a decision of the Board to release documents to the employer and requested that the Board delay until the worker could be contacted. The Board complied with the request and the documentation was not released. Several months later, the worker's representative, who still had not been able to contact the worker, withdrew. The Board then forwarded the file to the Tribunal.

Once the notice of appeal was sent to the Board, the Board should have forwarded the file to the Tribunal. It would then be up to the Tribunal to decide whether to grant additional time. The Board was attempting to be fair to the worker but thereby created an unfair situation to the employer.

The Panel concluded that it did not have jurisdiction. The worker's representative could not contact the worker to confirm authority to appeal. There was no indication that the worker intended to appeal or that he even knew of the Board's decision. [5 pages]

DECISION NO. 145/89 (03/04/90) McIntosh-Janis Drennan Jago

Stress - Disablement (stress) - Transportation industry (truck driver).

A long distance truck driver appealed a decision of the Hearings Officer denying entitlement for stress. The worker was 38 years old. He had been a truck driver since he was 16. In 1984, he began work as a long distance driver. At the end of 1984, the employer started to give the worker inexperienced co-drivers. There were often problems with these co-drivers and the worker had to do more than his share of driving. Many of the trips were eventful. In February 1985, the worker assisted in removing dead and injured victims from a truck that had been in an accident. In April 1985, the worker began to experience blackouts. In June 1985, he laid off.

The Panel reviewed Tribunal decisions about stress and agreed with Decision No. 1018/87 that a higher test was not warranted in stress cases. The Panel applied Decision No. 980/89 that it was necessary to establish that: a psychological disability existed that disabled the worker from performing the functions of the job; the disability was work related; the workplace made a significant contribution to the disability.

In this case, there was clear evidence that the worker had a disability which disabled him from performing the functions of his job.

The disability was work related, considering that: the symptoms arose after switching to long haul driving with inexperienced drivers; exposure to motor vehicle accidents, especially the accident in February 1985, was particularly troubling and stressful; other long haul drivers also suffered burn out to the point where the accident employer closed his business due to lack of dependable drivers; the worker's symptoms cleared when he was removed from long haul driving; there was supportive medical opinion.

The workplace contributed significantly to development of the disability. Stressors from outside the workplace were neither active nor significant at the relevant time. There were no preexisting personality traits.

The appeal was allowed. [12 pages]

WCAT Decisions Considered: Decision No. 94 (1988), 8 W.C.A.T.R. 1; Decision No. 918 (1988), 9 W.C.A.T.R. 48; Decision No. 1018/87 (1989), 10 W.C.A.T.R. 82; Decision No. 980/89

Other Statutes Considered: Industrial Accidents and Occupational Disease Act, R.S.Q. c.A-3.001, s.2

Cases Considered: *Lynch v. Department of the Solicitor General of Canada*, [1987] C.A.L.P. 590

DECISION NO. 122/90 (03/04/90) Faubert Higson Apsey

Issue setting - Adjournment (referral to Board) - Chronic pain.

The worker's total temporary benefits were terminated and that decision was confirmed by the Hearings Officer. The worker had retained a representative who requested that the Board consider the worker's entitlement for chronic pain. The Claims Adjudication Branch denied entitlement for chronic pain.

At the hearing of the appeal relating to the termination of the total temporary benefits, the worker was represented by her daughter. The daughter advised the Panel that the worker's representative informed her that a further appeal respecting chronic pain was contemplated.

The Tribunal had jurisdiction to deal with all sources of the worker's pain in determining her entitlement to further benefits. However, in this case the most appropriate procedure was to adjourn the hearing to permit the worker's representative to complete the presentation of his objections on the chronic pain issue before the Board.

In arriving at this conclusion the Panel considered the following factors. Although the worker's daughter was prepared to proceed on the date of the hearing with respect to all issues which were before the Panel, it would be inappropriate to make a final determination as to the degree of the worker's disability in

the absence of a representative retained to pursue an aspect of the claim that would be before the Panel. All the evidence relevant to the chronic pain issue had not been collected. The Board's adjudication of the chronic pain issue would cover the same time period as under consideration by the Panel. It would be best for the Board to complete its review of the worker's claim before any appeal to the Tribunal. [5 pages]

WCAT Decisions Considered: Decision No. 638/891 (1989), 12 W.C.A.T.R. 221

DECISION NO. 520/89 (03/04/90) Onen Preston Drennan

Psychotraumatic disability - Pensions (assessment) (preexisting condition) - Pensions (assessment) (depression) - Board Directives and Guidelines (pensions) (preexisting condition).

The worker appealed the level of his 10% pension for his non-organic disability, which took the form of depression and anxiety. He was receiving a 42% pension for neck, shoulder and vertigo problems. The Board decided on the 10% award on the basis that any disability in excess of this level represented the effect of a preexisting condition.

The worker never returned to work after the compensable accident in 1977. He lived with his family, did not socialize and required constant medical supervision. Episodes of serious illness required hospital treatment. Having regard to the categories and ratings in the Board's policy on the evaluation of impairment due to psychoneurosis, the Panel determined that the appropriate level of non-organic impairment was 27%.

However, prior to the accident, the worker already suffered from a moderate-level psychiatric disability. His employment was interrupted by a major episode of illness in 1973 and other periods of hospital treatment subsequently. He was prescribed medication that he continued to take until the compensable accident.

According to Board policy, a worker suffering from moderate pre-accident disability is to receive 75% of the assessed impairment. The worker was thus entitled to a non-organic pension of 20%, a level which represents 75% of his 27% assessed impairment. [9 pages]

Board Directives and Guidelines: Claims Services Division Manual, s.71(3), p.209, Directive 23; Claims Services Division Manual, s.108(2), p.235, Directive 1

DECISION NO. 190/90 (04/04/90) Bigras Cook Howes

Access to worker file, s.77.

Access to the worker's file was granted to the employer. [3 pages]

DECISION NO. 191/90 (04/04/90) Bigras Cook Howes

Access to worker file, s.77.

Access to the worker's file was granted to the employer. [3 pages]

DECISION NO. 189/90 (04/04/90) Bigras Cook Howes

Access to worker file, s.77.

Access to the worker's file was granted to the employer. [3 pages]

DECISION NO. 1046/89 (04/04/90) Starkman Higson Meslin

Continuing entitlement.

A nursing assistant suffered a low back strain in March 1985. The worker was entitled to continuing benefits subsequent to May 1987. There were different diagnoses but the preponderance of medical opinion suggested that the worker continued to suffer from an organic disability related to the compensable accident. [10 pages]

DECISION NO. 229/90I (06/04/90) Moore Lebert Apsey

Access to worker file, P.D. 1 - Procedure (Practice Direction No. 1).

The worker was examined by one of the Tribunal's medical assessors, a psychiatrist. Before the assessor's report was received, the worker advised that the report would contain information that she did not want the employer to receive. In fact, the worker did not want anyone to see the information, herself and her representative included. When the report arrived, it contained information that Tribunal Counsel considered irrelevant and potentially embarrassing to the worker. A Case Direction Panel was convened to make a preliminary decision regarding access.

A Case Direction Panel can be convened at the request of Tribunal Counsel to review the relevance of material under Practice Direction 1, even though the Practice Direction only refers to objections by workers or employers.

The worker had in effect waived her right to make submissions on the relevance of the information by requesting that she not see it. The employer, however, had not. Case Direction Panels only determine what should be revealed to the parties and to the Hearing Panel prior to the hearing. This does not preclude parties from making submissions to a Hearing Panel as to why any deleted information should be seen and considered by the Hearing Panel.

The portions of the report which related to the worker's medical history were irrelevant and should not be made available to the employer. The worker's request that the material not be made available to her, or to her representative, should be honoured. Since the irrelevant portions pervaded the entire report, the assessor was directed to redraft the report so as to contain only the results of his examination of the worker and answers to specific questions put by the Tribunal's Medical Liaison Officer, without reference to the specifics of the worker's psychiatric history. [5 pages]

Practice Directions Considered: Practice Direction No. 1 (1986), 1 W.C.A.T.R. 220

DECISION NO. 236/90I (06/04/90) Onen Cook Jago

Issue setting - Adjournment (referral to Board).

The worker was appealing a decision of the Hearings Officer denying further benefits. The Panel identified a chronic pain issue, regarding which the Board had not obtained any evidence. The hearing was adjourned and the matter referred to the Board. [4 pages]

Practice Directions Considered: Practice Direction No. 9 (1987), 7 W.C.A.T.R. 444

DECISION NO. 807/88F (06/04/90) Bigras McCombie Ronson

Permanent disability - Impairment of earning capacity - Pensions (Rating Schedule) (eye) - Pensions (assessment) (eye).

The worker appealed a decision of the Hearings Officer denying a pension for an eye disability. Acid splashed into the worker's left eye. The worker had a permanent small corneal scar as a result. The Hearings Officer found that the worker's eyesight was 20/30 after correction with glasses.

The Panel found that tests showed visual acuity at 20/40 after correction and that, therefore, the worker would be entitled to a 1% pension according to the Rating Schedule for partial loss of vision.

In addition, the corneal scar caused blurring and distortion of vision, which made it difficult for the worker to do his work using small parts. This was a partial loss of sight which was not measured on the visual loss scale of the Rating Schedule. The Panel compared the worker's loss of sight with the rating of 16% for complete loss of sight in one eye and awarded an additional 4% pension.

The worker was awarded a total pension of 5%. [7 pages]

WCAT Decisions Considered: Decision No. 915 (1987), 7 W.C.A.T.R. 1; Decision No. 807/88

DECISION NO. 4/90 (06/04/90) Onen Fox Preston

Access to worker file, s.77 - Procedure (absent parties).

The worker did not appear for a s.77 appeal for which he requested an oral hearing. After attempting to telephone the worker, a letter was sent indicating that the appeal would be decided on the basis of the written application if the Tribunal were not provided with satisfactory reasons for his absence. The worker did not respond and the Panel proceeded on the basis of the written application.

Access to the worker's file was granted to the employer. [4 pages]

DECISION NO. 612/87I (06/04/90) Carlan Higson Apsey

Issue setting.

The worker appealed a decision of the Hearings Officer denying further entitlement for a low back injury. The Hearings Officer specifically did not consider entitlement for an inguinal hernia.

The Panel found that the worker's entitlement during the period in question could not be determined

without considering the hernia. On agreement with the parties, the Panel deferred making a decision until there was a final decision of the Board regarding the hernia.

The Board granted entitlement for the hernia. The Panel would now wait for further submissions from the parties, failing which the appeal would be considered withdrawn. [3 pages]

DECISION NO. 888/89 (09/04/90) Lax McCombie Kowalishin

Continuing entitlement - Suitable employment.

An auto assembly line worker suffered a shoulder injury in May 1985. The worker was entitled to full temporary partial disability benefits from August 1985 to September 1986. Modified employment installing switches was not suitable since it involved lifting. The worker's shoulder condition was a significant contributing factor to the inability to perform the job. Other non-compensable disabilities may have been factors but the shoulder condition was also a contributing factor. [8 pages]

DECISION NO. 559/89 (09/04/90) Hartman Cook Meslin
F.L. Industries Inc. v. Benzaquen

Section 15 application - Employer - Damages, contribution or indemnity - Out of province.

The defendant worker's employer was a Schedule 1 employer. The employer was owned by an American holding company.

The Panel found that the worker was employed by his employer, the Schedule 1 employer. The right of action against the defendant employer was taken away.

Section 8(11) applied not just to leasing companies but to the defendant holding company as well. There was nothing in the wording of s.8(11) that would exclude a foreign corporation from its application in an Ontario court. There was no right of recovery of damages from the holding company for the portion of loss or damages caused by negligence of the defendant worker or employer. [9 pages]

WCAT Decisions Considered: Decision No. 337 (1986), 2 W.C.A.T.R. 141; Decision Nos. 816/87, 1261/87, 1266/87, 559/89

Cases Considered: Ling v. Transamerica Commercial Corp. et al. (1980), 31 O.R. (2d) 32; Meyer et al. v. Workers' Compensation Board (1986), 15 O.A.C. 202

DECISION NO. 368/89R (10/04/90) Starkman McCombie Meslin

Reconsideration.

The worker's request for reconsideration of Decision No. 368/89, which denied the worker's claim for ongoing back problems on the basis that they were attributable to non-compensable degenerative disc disease, was dismissed. At the hearing of the decision under reconsideration, the worker's representative directed the Panel's attention to the arguments and evidence available in support of the existence of a causal relationship between the worker's back problems and his compensable accidents. The Panel reviewed the evidence and determined that no such causal relationship existed. There was no reason for this Panel to interfere with that decision. [3 pages]

WCAT Decisions Considered: Decision No. 95R (1989), 11 W.C.A.T.R. 1; Decision Nos. 72R, 72R2, 368/89

DECISION NO. 1014/89 (10/04/90) Stewart Higson Nipshagen (dissenting)*Accident (occurrence) - Delay (treatment).*

The majority of the Panel found that the worker suffered an accident at work in late 1980 which caused the worker's condition, diagnosed as a prolapsed disc condition. The worker claimed that he felt a pain in his leg while carrying a heavy object down a ladder. He did not consider it a serious matter initially and did not seek medical attention until March 1981.

Correspondence from the employer confirmed that an accident took place. A co-worker's inability to remember, in March 1982, an incident that the worker himself considered minor at the time, was not surprising. There was inconsistency in the medical reporting, but two of the reports, including that of the first doctor consulted, were consistent with the worker's account. Only one report indicated that the worker had reported a history of back problems. This was not suggested by any other evidence and was likely the result of a communication problem. A Board doctor reported that the incident as described by the worker was consistent with the diagnosis.

The Employer Member, dissenting, found no causal relationship between the alleged accident and the back disability, due to: the delays in reporting the accident and in seeking treatment; the strong suggestion of preexisting degenerative disc disease in the medical reports; and the lack of witnesses to a specific incident, despite the proximity of a co-worker. [8 pages]

DECISION NO. 146/90 (10/04/90) Bigras Fox Apsey*Medical examination (section 21).*

The worker had sustained a compensable injury to his back, but had returned to work on modified duties, when he advised his supervisor that his back pain had been aggravated and that he was going home. The supervisor insisted that the worker seek immediate medical attention. The worker argued that this constituted a request by the employer for a medical examination under s.21(1) of the Act. The worker thus applied under s.21(2) for an order that he not be required to submit to the examination.

The employer's request for a medical examination in this case did not fall within the ambit of s.21 as it did not meet the requirement that the worker submit to an examination by a doctor "selected and paid for by the employer". The employer neither chose a specific doctor nor offered to pay medical fees. The employer's request also did not meet the requirement in Tribunal jurisprudence that the examination have a valid compensation goal. The employer did not request a medical report, but only a certificate attesting to the worker's ability to perform his job.

Therefore, absent a valid request by the employer under s.21(1), there could be no valid objection by the worker under s.21(2). The worker's application was dismissed. [4 pages]

WCAT Decisions Considered: Decision No. 696/88 (1989), 10 W.C.A.T.R. 308; Decision No. 850/87

DECISION NO. 106/90 (11/04/90) Hartman Fox Nipshagen*Continuity (of treatment) - Fasciitis (plantar).*

The worker suffered a sprained right ankle in July 1975 when his foot went through the broken second rung of a ladder. In October 1975 he again injured his right foot when it gave way while he was walking over

some pipes. In January 1977 a pipe fell on his right foot. The worker claimed that his right heel condition, plantar fasciitis, was triggered or aggravated by these three compensable accidents.

Plantar fascia tenderness was noted and a cortisone injection of the right heel was given in 1975, after the second accident. However, the diagnosis of plantar fasciitis, and the attempt to surgically correct it, was not made until 1986. The Panel concluded that the worker's condition had resolved and that he was suffering no symptoms between 1977 and 1985. The worker sought no medical attention during this time and though he was in contact with the Board regarding other claims, no mention was made of his foot condition. There was no causal relationship between the compensable accidents and the diagnosis of plantar fasciitis. [8 pages]

DECISION NO. 618/89 (11/04/90) Marcotte Jago Heard

Rehabilitation, vocational (cooperation) - Temporary partial disability.

The worker sustained a back injury in July 1985. On reviewing the evidence, the Panel found that as of July 1986 the worker was unable to return to his regular employment as an auto mechanic, but that he was only partially disabled.

The rehabilitation program offered to the worker by the Board required the worker to conduct a job search. As the worker did not seek employment, he failed to co-operate with his program and he failed to make himself available for suitable employment. Though the worker participated in physiotherapy, chiropractic and TENS treatment programs, they were neither approved by the Board nor successful in getting the worker back to work.

The worker was not entitled to temporary disability benefits. As four doctors had recommended retraining, the Panel recommended that the Board consider providing the worker with such assistance. [10 pages]

WCAT Decisions Considered: Final Decision No. 2 (1987), 4 W.C.A.T.R. 1; Decision No. 121 (1986), 3 W.C.A.T.R. 81; Decision No. 548/87 (1987), 5 W.C.A.T.R. 176

DECISION NO. 741/89 (11/04/90) Moore Cook Gabinet

Pensions (assessment) (foot) - Pensions (assessment) (prosthesis).

The worker was awarded a 3% pension for a right foot disability. On reassessment, the pension examiner recommended a further 4% pension due to developing instability in the right ankle. The Panel accepted the recommendation and awarded the increased pension retroactive to three months prior to the date of a medical report which referred to a tendency of the ankle to go over.

The worker's pension should not be reduced due to use of a prosthetic shoe. The prosthesis lessened the symptoms but not the disability itself. [7 pages]

WCAT Decisions Considered: 741/89

DECISION NO. 535/89 (11/04/90) Moore Heard Preston

Causation (heart attack) - Heart attack - Burns - Benefit of the doubt.

The worker suffered near-fatal burns, including inhalation injuries, during a work accident that

occurred in March 1972. He was granted a provisional 100% disability award in 1974, which was made permanent in 1978. In December 1976, the worker was hospitalized for treatment of a heart condition. He claimed health care benefits for costs arising out of treatment for his heart condition.

Investigations in 1976 clearly disclosed that the worker had suffered previous myocardial infarction. The only event noted by the worker that could be described as heart failure, was a two or three minute period, during his hospitalization for the burn accident, when he felt like someone was sitting on his chest.

The issues were whether the worker could reasonably have suffered a myocardial infarction during his treatment in 1972 and, if he did, could the infarction reasonably be considered a result of his burn injuries.

Three doctors suggested viable mechanisms whereby the worker could have suffered a myocardial infarction shortly after sustaining his burn injuries and they all concluded that the likelihood of such an event happening could not be ruled out from a medical point of view.

It was impossible to finally determine when the worker's infarction took place. As the evidence for and against was approximately equal, the benefit of the doubt should be applied to resolve the question in the worker's favour and a finding made that the infarction took place while the worker was being treated for his burns in March 1972. The worker was entitled to health care benefits for his heart condition experienced since 1976. [10 pages]

DECISION NO. 99/90 (12/04/90) Stewart Robillard Clarke

Continuing entitlement.

The worker suffered four compensable injuries in 1978. The worker appealed a decision of the Hearings Officer denying ongoing benefits for a low back disability.

The worker was not entitled to further benefits. The diagnosis at the time of the compensable accidents was always strain. A tentative diagnosis of disc protrusion was given only after an incident at home shovelling snow. A relationship between the ongoing disability and the compensable accidents was not established. The appeal was dismissed. [8 pages]

WCAT Decisions Considered: Decision No. 111 (1986), 3 W.C.A.T.R. 47

DECISION NO. 133/90 (12/04/90) Bigras Ferrari Apsey

Issue setting - Worker (test) - Accident (occurrence).

The worker appealed a decision of the Hearings Officer denying entitlement for a shoulder injury which the worker claimed he suffered when he reached out to grab a slipping beam.

Although not an issue before the Hearings Officer, the Panel considered whether the worker was a worker for the purposes of the Act. He was working for his brother at the time. The Panel found that the brother was in charge and that the worker was, in fact, working for the brother.

The worker was credible. The Panel accepted the occurrence of the accident.

The appeal was allowed. [7 pages]

Cases Considered: *Montreal v. Montreal Locomotive Works Ltd.*, [1947] 1 D.L.R. 161; *Stevenson Jordan and Harrison Ltd. v. MacDonald and Evans*, [1952] 1 T.L.R. 101

DECISION NO. 90/90 (12/04/90) Moore Robillard Ronson*Suitable employment.*

A painter suffered a compensable back injury in June 1986. He returned to modified work as a painter in September 1987 but laid off in December 1987. Considering the medical evidence, especially the contemporaneous medical reports which were supportive of the worker's decision to stop working, the Panel found that the modified work was not suitable. The worker was entitled to full temporary benefits until he achieved maximal medical rehabilitation in March 1988. He should be assessed for a pension as of that date. [8 pages]

DECISION NO. 858/88R (12/04/90) Starkman Robillard Jewell*Reconsideration (consideration of evidence).*

The employer applied to reconsider Decision No. 858/88. The employer raised concerns that certain matters discussed at the hearing were not dealt with in the final decision.

There was no reference to hunting activities of the worker. However, the Panel was satisfied that little walking or lifting was required in the kind of hunting done by the worker and that this activity did not have any particular significance to continuing entitlement.

There was no obligation to comment on every medical report.

The application was denied. [3 pages]

WCAT Decisions Considered: Decision No. 95R (1989), 11 W.C.A.T.R. 1; Decision Nos. 72R, 72R2

DECISION NO. 1036/89 (12/04/90) Marcotte Higson Preston**Priority Parcel Ltd. v. Akinniyi***Section 15 application - Worker (test) - Independent operator (courier) - Transportation industry (courier).*

The defendant, a courier service, entered into a verbal contract with the plaintiff for the plaintiff to pick up and deliver parcels. The plaintiff was to receive \$750 per week. He supplied his own van, did not need to wear a uniform or display any insignia on the van and did not have to work exclusively for the defendant.

Considering the various tests for determining employment status, the Panel found that the plaintiff was an independent operator. The plaintiff's right of action was not taken away. [13 pages]

WCAT Decisions Considered: Decision No. 154 (1986), 1 W.C.A.T.R. 208; Decision No. 46/87 (1987), 4

W.C.A.T.R. 319; Decision No. 546

Cases Considered: Mayer v. J. Conrad Lavigne Ltd., 27 O.R. (2d) 129; Montreal v. Montreal Locomotive Works Ltd., [1947] 1 D.L.R. 161

DECISION NO. 244/90 (12/04/90) Onen Drennan Nipshagen*Aggravation (preexisting condition) (osteoarthritis) - Disablement (nature of work) - Osteoarthritis (hand).*

The worker was a sewing machine operator until 1985 when she was switched to work as a mender and

weaver in the burling department. Work in the burling department aggravated preexisting osteoarthritis in her hands. It caused an aggravation in the inflammation process resulting in greater disability. The worker was entitled to benefits for disablement. [7 pages]

DECISION NO. 121/90 (12/04/90) Moore Fox Howes

Commutation (vehicle purchase).

The worker appealed a decision of the Hearings Officer denying a partial commutation in the amount of \$16,000 of his pension, valued at about \$100,000. The worker wanted the commutation to purchase a car in order to facilitate commuting to his current job and to enable him to develop his own business.

The worker borrowed his employer's van to get to his current job but this arrangement was not reliable. Developing his own business was important since further deterioration of his physical condition was anticipated. Alternative financing had not been sought but the Panel accepted that carrying a \$16,000 loan was beyond the financial capacity of the worker.

The appeal was allowed. [6 pages]

DECISION NO. 212/90 (12/04/90) Moore Lebert Seguin

Access to worker file, s.77.

Access to the worker's file was granted to the employer. [3 pages]

DECISION NO. 214/90 (12/04/90) Starkman Fox Sutherland

Accident (occurrence) - Disability.

The Panel found that the worker suffered a personal injury at work while attempting to open the door of a van. However, the worker's disability in the ensuing period was due to a preexisting condition rather than the accident. The Panel noted that the worker had been experiencing episodes of back pain following a non-compensable motor vehicle accident and that the worker visited his chiropractor shortly after the incident at work without relating the pain to the incident at work. [5 pages]

DECISION NO. 62/90 (17/04/90) Bradbury Beattie Preston

Rehabilitation (cooperation).

A carpenter suffered a back injury in October 1985. The Board reduced benefits to 50% from September 1986 to February 1987.

The Panel found that the worker was temporarily partially disabled during the period in question and entitled to full benefits. He was not capable of returning to his previous work as a carpenter. He cooperated with medical and vocational rehabilitation that was provided and was available for suitable modified work. [5 pages]

DECISION NO. 777/89 (17/04/90) Carlan Felice Preston*Pensions (arrear).*

The worker suffered a compensable injury for which he underwent a right hip replacement. In 1977, he was awarded a 65% pension. This was confirmed by the Appeal Board in 1980. In 1986, he was reassessed for a 100% pension due to wrist, back and left leg problems which were caused by altered gait. Arrears were paid to 1981, one year following the Appeal Board decision, since Board policy prevented a Hearings Officer from effectively overruling an Appeal Board decision.

The Panel found that the sequelae were evidence early on in the claim. The worker was entitled to a 100% pension from 1977 to 1981. [4 pages]

WCAT Decisions Considered: 777/89L

DECISION NO. 85/90 (17/04/90) Kenny McCombie Preston*Medical opinion (atypical facial pain).*

The worker fell, sustaining a significant impact to the head, possible loss of consciousness and/or other signs of cerebral injury. Prior to the fall, the worker experienced pressure-type facial pain around the eyes and temples which was not disabling. Subsequently, the worker suffered from intense localized pain in his left cheek which was diagnosed as "atypical facial pain". Other associated symptoms included migraine headache, nausea, jaw pain and sensitivity to noise. There were dramatic changes in the worker's professional, family and social life.

The Panel accepted the medical opinion that the accident, in some undetermined fashion, caused the development of the atypical facial pain, which represented a new condition rather than an aggravation of the preexisting condition. The worker was entitled to benefits. [10 pages]

DECISION NO. 176/90 (18/04/90) Faubert Fox Gabinet*Access to worker file, s.77.*

Access to the worker's file was granted to the employer. [3 pages]

WCAT Decisions Considered: 761/88

DECISION NO. 174/90 (18/04/90) Faubert Fox Gabinet*Access to worker file, s.77.*

Access to the worker's file was granted to the employer. [3 pages]

DECISION NO. 245/90 (18/04/90) Strachan Lebert Ronson

Arising out of employment (assault) - In the course of employment (fighting) - Accident (definition of) - Wilful and intentional act.

The worker was returning to his work station, carrying a coffee, when he was pushed by a co-worker, fell and injured his back. The Board disallowed the worker's claim on the basis that he had participated in a fight. There had been some antagonism between the worker and the co-worker six months earlier.

The Board's interpretation of its policy on fighting amounts to a virtual presumption that in any case involving a fight, participation in that fight takes the worker out of the course of employment or means that it does not arise out of the employment. Such an interpretation is inconsistent with the Act.

The injury was the result of an unprovoked assault by an aggressive co-worker, rather than a "fight". The assault was "a wilful and intentional act, not being the act of the worker", within the s.1(1)(a)(i) definition of "accident". The worker was entitled to benefits. [6 pages]

WCAT Decisions Considered: Decision Nos. 71/87, 879/87

Board Directives and Guidelines: Claims Adjudication Branch Procedures Manual, Document no. 33-05-03

DECISION NO. 175/90 (18/04/90) Faubert Fox Cabinet

Access to worker file, s.77 (relevance) - Access to worker file, s.77 (issue in dispute) (SIEF).

The issue in dispute for a s.77 appeal was SIEF. The Panel followed Decision No. 1083/87 and took a broad approach to assessing relevance of documents. The absence of specific information in a document relating to the existence of a preexisting condition does not necessarily render the document irrelevant. The absence of such information may be significant in the context of the report. Moreover, the absence of such information in reports which address the causes of a worker's disability may be described as evidence which could disprove the matter in issue.

Access to the worker's file was granted to the employer, except for several documents which were not relevant. [4 pages]

WCAT Decisions Considered: Decision No. 1083/87 (1988), 9 W.C.A.T.R. 181; Decision No. 1051/87

**DECISION NO. 921/89 (18/04/90) Strachan Cook Nipshagen
Stork Diaper Service Co. Ltd. v. McGinnis**

Section 15 application - Worker (hybrid test) - Independent operator (diaper service driver).

The plaintiff worked as a route driver for a diaper service. The plaintiff brought an action for an injury resulting from new equipment in the truck.

In considering whether the plaintiff was a worker or independent operator, the Panel reviewed Tribunal decisions and the various tests for determining employment status and found that the Tribunal had developed a test that seeks to determine the business reality of the business situation. This hybrid test involves consideration of various factors including: ownership of equipment; form of compensation; business indicia; coordinational control; intention of parties; business or government records; economic or business market; existence of similar services; substitute service; size of consideration or payments; degree of integration.

In this case, the plaintiff was a worker. The true nature of the relationship was one of the employer/worker rather than independent operator. This was the business reality of the situation.

The plaintiff's right of action was taken away. [21 pages]

WCAT Decisions Considered: Decision No. 86 (1986), 2 W.C.A.T.R. 52; Decision No. 154 (1986), 1 W.C.A.T.R. 208; Decision No. 503/87 (1987), 6 W.C.A.T.R. 144; Decision No. 576/87 (1987), 6 W.C.A.T.R. 163; Decision No. 423/88 (1988), 10 W.C.A.T.R. 216; Decision Nos. 56/87, 422/87, 422/87, 701/87, 872/87, 417/88, 590/89, 755/89

Regulations Considered: Reg. 951, Schedule 1 Class 18

Other Statutes Considered: Labour Relations Act, R.S.O. 1980 c.228

Cases Considered: Market Investigations Ltd. v. Minister of Social Security, [1968] 3 All. E.R. 732; Mayer v. J. Conrad Lavigne Ltd. (1979), 27 O.R. (2d) 129; Montreal v. Montreal Locomotive Works, [1947] 1 D.L.R. 161; Stevenson, Jordan and Harrison Ltd. v. MacDonald and Evans, [1952] 1 T.L.R. 101

DECISION NO. 800/87R (19/04/90) Strachan McCombie Apsey

Aggravation (preexisting condition) (disc, degeneration) - Reconsideration.

The worker suffered a compensable injury in February 1985 when he fell down stairs. He returned to work for three days in August 1985, then laid off again until November 1985.

The worker was entitled to benefits for the lay-off in August 1985. The worker's preexisting cervical degenerative disc condition was aggravated by strenuous work performed during the three days that the worker returned to work. [12 pages]

WCAT Decisions Considered: 800/87

DECISION NO. 274/90 (20/04/90) Signoroni Lebert Apsey

Access to worker file, s.77.

Access to the worker's file was granted to the employer. [4 pages]

DECISION NO. 231/90 (20/04/90) Kenny Rao Apsey

Disablement (change in work).

The worker was entitled to benefits for a back condition in May 1986. The condition resulted from the unusually heavy nature of work during the weeks preceding the lay-off, involving steady use of a chipping gun to break up floor cement. [6 pages]

DECISION NO. 275/90I (20/04/90) Onen Cook Barbeau

Adjournment (referral to Board) - Chronic pain.

An appeal regarding continuing entitlement for a back condition was adjourned and the matter referred to the Board to complete investigation respecting involvement of chronic pain. After completion of the Board process, the matter should be returned to the Panel. [4 pages]

DECISION NO. 248/90 (20/04/90) Starkman Beattie Preston

Delay (onset of symptoms) - Preexisting condition.

The worker sustained a bilateral inguinal hernia in a compensable accident in May 1986. The worker was not entitled to benefits for a low back condition which he related to the accident, considering delay in onset of symptoms until July 1986 and the existence of a preexisting back condition dating back to 1977. [7 pages]

**DECISION NO. 258/90 (23/04/90) Kenny Ferrari Jago
Rogers v. Malfara**

Section 15 application - Executive officers.

The deceased was vice-president and treasurer of a construction company. The deceased, his two brothers and a brother-in-law were officers, directors and shareholders of the company. Major decisions were made by agreement between the four. Usually the deceased monitored a particular geographic area. However, for a period prior to the accident, the deceased was working at a specific project operating a backhoe and acting as foreman. He was killed when he was pinned between the backhoe and a dump truck.

The Panel agreed with Decision No. 170/90 and found that the deceased was an executive officer even though he may have been performing duties of a worker at the time of the accident. The right of action of the deceased's dependants was not taken away. [9 pages]

WCAT Decisions Considered: Decision No. 51 (1987), 4 W.C.A.T.R. 67; Decision No. 304 (1987), 4 W.C.A.T.R. 134; Decision No. 516 (1987), 4 W.C.A.T.R. 210; Decision No. 337/88 (1988), 10 W.C.A.T.R. 182; Decision No. 170/90

DECISION NO. 839/89 (23/04/90) Kenny Klym Jago

Commutation (home purchase).

The worker appealed a decision of the Hearings Officer denying a partial commutation of his 100% pension. The pension was valued at about \$393,000. The worker had agreed to purchase a condominium for \$259,000, had already paid about \$74,000 and wanted the commutation to pay the balance. In Decision No. 839/89I, the Panel arranged for the worker to get financial counselling.

The evidence clearly established that the worker lacked the ability to manage money well. The worker and his wife lacked insight into their financial situation. There was no indication that the meeting with a financial counsellor resulted in any greater financial insight on their part.

There was no rehabilitative aspect to the commutation. Receipt of a 100% pension does not mean a worker will never qualify for a commutation. However, it is particularly important in such cases to be satisfied that a commutation will not jeopardize the worker's ability to meet future financial obligations.

The appeal was dismissed. [10 pages]

WCAT Decisions Considered: Decision No. 16 (1986), 1 W.C.A.T.R. 62; Decision No. 206A (1988), 9 W.C.A.T.R. 4; Decision No. 608/89 (1989), 12 W.C.A.T.R. 216; Decision Nos. 979/87, 1207/87, 100/88, 120/88, 253/88, 290/88, 892/88, 471/89, 750/89, 762/89, 839/89I

Board Directives and Guidelines: Guidelines for the Commutation of Pensions, Board Minute 3, March 20, 1979, p.71

DECISION NO. 132/90L (24/04/90) Chapnik Robillard Nipshagen

Leave to appeal (good reason to doubt correctness) (Board procedure) - Leave to appeal (good reason to doubt correctness) (consideration of evidence).

The Appeal Board denied an increase in the worker's pension for hearing loss and denied entitlement for tinnitus.

In proceedings before the Board, the Appeals Adjudicator level of adjudication was skipped. This did not constitute good reason to doubt correctness of the Appeal Board decision. The worker, who was represented, did not object at the time. The Board investigated in this case, as opposed to Decision No. 813 in which there was limited investigation of one of the claims. The worker submitted that he was deprived of an appeal as of right due to the Appeal Board decision in June 1985 but the Panel noted that the Appeal Board hearing did not take place until five years after the decision of the Decision Review Branch.

The Panel found good reason to doubt the correctness of the decision to deny entitlement for tinnitus. The Appeal Board relied on the opinion of its consultants without giving due consideration to other relevant weighty evidence addressing the issue. Leave to appeal was granted on this issue. [9 pages]

WCAT Decisions Considered: 157, 813

**DECISION NO. 956/89 (24/04/90) Hartman Robillard Nipshagen
McKechnie v. Simpson**

Section 15 application - In the course of employment (horseplay).

The plaintiff and defendant were teenagers employed at a restaurant. They attended a company meeting, for which they were paid. After the meeting, they went to the staff room. The defendant had an air gun which he had found on the premises earlier. While shooting spitballs, the plaintiff was hit in the eye.

The Panel noted that, while s.3 and s.8(9) both use the phrase "in the course of employment", facts considered on entitlement appeals lead to analyses which are not always interchangeable with those in s.15 applications. An example of the danger of equating s.3 and s.15 decisions, without appreciating the differing contexts, was given by the dissent in Decision No. 804/89.

In this case, the injury giving rise to the injury was not premeditated or deliberate. Employers hiring staff who are predominantly teenagers can be expected to be knowledgeable about risks peculiar to that group, such as horseplay and experimentation. Neither worker took himself out of the course of employment.

The plaintiff's right of action was taken away. [13 pages]

WCAT Decisions Considered: Decision No. 337 (1986), 2 W.C.A.T.R. 141; Decision No. 234/87 (1989), 10 W.C.A.T.R. 64; Decision No. 804/89
Board Directives and Guidelines: Claims Adjudication Branch Procedures Manual, Document no. 33-05-04

DECISION NO. 616/88 (24/04/90) Hartman Ferrari (dissenting) Preston

Hearing (attendance of worker) - Investigation by Tribunal (post-hearing) - Continuing entitlement - Chondromalacia (knee) - Chondromalacia (thigh).

The employer appealed a decision of the Hearings Officer granting benefits subsequent to February 1985 for a right knee disability related to an accident in June 1984.

In a preliminary matter, the employer requested an adjournment because of the absence of the worker. Although the Panel would have preferred the worker to be present, the Panel denied the request since the issue on appeal appeared to be predominantly medical, involving interpretation of medical reports.

In post-hearing deliberations, the Panel decided to obtain clarification from the worker's doctor. However, the worker refused to consent, claiming that the Tribunal did not have the authority to request further information post-hearing. The Panel then stated that, if the worker did not consent, it would reconvene the hearing solely for the purpose of questioning the doctor. The consent was subsequently received.

The majority of the Panel found that the worker had preexisting non-compensable chondromalacia patella but that the accident did not aggravate this condition. Rather, the accident irritated synovial plica leading to chondromalacia of the thigh. This condition was not disabling after February 1985. The evidence did not establish that the chondromalacia of the knee was compensable. The appeal was allowed.

The Worker Member, dissenting, found that the accident aggravated the preexisting chondromalacia patella and that the worker continued to be disabled by this condition subsequent to February 1985. [14 pages]

DECISION NO. 731/88 (24/04/90) Hartman Fox Nipshagen

Delay (treatment) - Dysuria - Enuresis - Impotence - Aggravation (preexisting condition) (dysuria) - Aggravation (preexisting condition) (enuresis) - Aggravation (preexisting condition) (impotence).

The worker suffered strained muscles in the groin area while lifting a large spool of wire, in May 1979. The incident was reported, but no time off work was lost. In August 1985, the worker reported an injury at work that was described as like "doing the splits". The only time lost from work was three weeks at the end of September 1985. Medical attention for this injury was not sought until November 1985. The worker was active in skiing and cycling and had suffered spectacular crashes in both sports.

The worker claimed that he notice penile pain and groin discomfort immediately following the 1979 work accident. However, medical treatment was not sought out until 1982 when the worker complained of penile pain, enuresis, dysuria and impotence. The worker did not make a connection between these symptoms and the 1979 accident until 1985, during the course of chiropractic treatment.

The Panel concluded that the worker's symptoms did not begin until 1981 or 1982, and therefore was not persuaded that the 1979 injury was compatible with these symptoms. These complaints arose independently from the 1979 accident and constituted a preexisting condition at the time of the 1985 accident.

The worker's accounts of his problems to doctors both in Canada and the United States did not refer to the 1985 accident. This was inconsistent with an aggravation of preexisting injuries by the 1985 accident. The worker was not entitled to benefits. [8 pages]

DECISION NO. 230/90 (25/04/90) Carlan Cook Sutherland

Delay (onset of symptoms).

In 1969, the worker was unloading a truck. He slipped and fell, struck his head and fell out of the truck onto the side walk. He was awarded a 35% pension for left knee and neck disabilities.

The worker was not entitled to benefits for a low back disability, considering delay in onset of symptoms and consistency of his back symptoms with degenerative changes. [5 pages]

DECISION NO. 894/89 (25/04/90) Moore Cook Seguin

Experience rating (CAD-7) - Discretion, Board (experience rating)(fettering) - Discretion, Board (experience rating)(standard of review).

The employer appealed surcharges on its assessment under the CAD-7 formula for the years 1986 and 1987. In 1986, the employer expanded, hiring a significant number of inexperienced workers. In the years in issue, the actual injury frequency was almost three times greater than the expected, although the actual injury costs were only about one-third of the expected.

The CAD-7 formula contains no process to request some sort of exceptional treatment. The Board will consider whether the formula was applied correctly but will not consider whether the formula, though applied correctly, has led to an unfair result.

The Panel found that it had jurisdiction regarding the formula and its operation in particular cases. The standard of review was whether the Board exercised its discretion improperly because either the plan as a whole as inconsistent with the Act or a particular aspect of the formula appeared to violate the Act. If such a finding is made, it is appropriate to apply a remedy that will make the exercise of discretion appropriate with the Act. Strict application of the formula is inconsistent with s.80 and the Board, by limiting its involvement to strict terms of the formula, has fettered its discretion to some extent.

In this case, application of the formula was neither unfair nor unreasonable. The employer hired a significant number of inexperienced workers without providing the kind of safety training that would have eliminated some of the accidents that occurred.

The Panel noted that, under the CAD-7 formula, once the accident frequency becomes double the expected rate, the employer faces a surcharge regardless of how low accident costs are for the same period. There is incentive for unscrupulous employers to pressure workers not to report claims. This potentially undermines one of the cornerstones of the Act.

The appeal was dismissed. [11 pages]

WCAT Decisions Considered: Decision No. 112 (1986), 3 W.C.A.T.R. 54; Decision No. 915 (1987), 7 W.C.A.T.R. 1; Decision No. 86/89

DECISION NO. 216/90I (26/04/90) Stewart Robillard Preston

Procedure (absent parties).

The employer was not present at the hearing of a worker's appeal, although it had indicated it would be participating. After being reached by telephone, the employer acknowledged receiving the notice of hearing and that it no longer intended to send a representative. However, when informed that the appeal was a new hearing, the employer requested an adjournment.

The employer's request for adjournment was denied as there were no exceptional circumstances. However, the Panel had to adjourn the hearing due to the absence of an interpreter who had been scheduled to attend. [3 pages]

DECISION NO. 42/90 (26/04/90) Chapnik Felice Preston

Continuing entitlement - Intervening causes - Availability for employment (job search).

A 52 year old foundry worker suffered lacerations of his left hand in July 1984. In January 1985, he

suffered a non-compensable fracture of his left wrist. Benefits were terminated in October 1985. In October 1986, a 3% pension was awarded.

The worker continued to be partially disabled by weakness of grip and limitation of movement beyond October 1985 and the compensable accident was a significant contributing factor to the disability.

The worker was unable to perform his pre-accident job due to the heavy nature of the work and modified work was not available. Considering his age, medical restrictions and limited skills, the worker was unlikely to obtain employment without considerable encouragement and guidance. However, the worker did not receive such assistance from the Board. He conducted a job search, although there is no doubt that he could have tried harder. In the circumstances, his efforts were reasonable. The worker was entitled to full benefits from October 1985 to October 1986. [13 pages]

WCAT Decisions Considered: Decision No. 2 (1987), 4 W.C.A.T.R. 1; Decision No. 59 (1987), 5 W.C.A.T.R. 17; Decision No. 137 (1987), 4 W.C.A.T.R. 87; Decision No. 288 (1987), 4 W.C.A.T.R. 127

DECISION NO. 264/90 (26/04/90) Signoroni McCombie Apsey

Issue setting - Withdrawal (of appeal).

The worker was appealing denial of benefits in 1983 for a condition that the worker claimed was related to a compensable neck injury suffered in 1979.

The Panel noted reference in reports to non-organic symptoms, as well as a multitude of other ailments. The Panel could not proceed on the narrow organic claim because of the importance of the whole person concept.

In the circumstances, the Panel granted the worker's request to withdraw the appeal. [4 pages]

DECISION NO. 978/89R (26/04/90) Strachan Fox Preston

Reconsideration (consideration of evidence).

The worker's request to reconsider Decision No. 978/89 was denied. There was nothing in the original material or in the request for reconsideration to lead the Panel to deviate from its earlier conclusion. [4 pages]

WCAT Decisions Considered: 978/89

Practice Directions Considered: Practice Direction No. 8 (1987), 1 W.C.A.T.R. 233

DECISION NO. 797/89 (26/04/90) Chapnik Higson Jago

Earnings basis (wage loss supplement) - Earnings basis (second accident) - Supplements, temporary (wage loss) - Words and phrases (remuneration, s. 1(1)(i)) - Words and phrases (earnings, s. 43(1)) - Merits and justice.

The worker suffered a compensable injury in 1981. As part of his rehabilitation program, in February 1986, he was employed as a trainee with a courier company. He stayed on with that company and commencing in September 1986, he was paid an hourly wage by the employer and also received a wage loss supplement from the Board. In January 1987, the worker suffered another work-related injury.

The issue was whether the worker's earnings, for purposes of the calculation of benefits payable after the 1987 accident, should be restricted to the amount paid by the employer, or should also include the amount of the wage loss supplement.

Whether or not supplements should be considered part of the worker's earnings, depends on the circumstances of each case and should be determined in accordance with the individual merits of each case. Often, the purpose of supplements is primarily rehabilitative, such as in the case of supplements paid to an unemployed worker as a form of insurance payment or financial assistance. For that reason, supplements should not be automatically included in the calculation of earnings. However, where supplements are granted to "top up" wages, the consideration received by the worker for his services can be viewed as including both actual wages and the wage loss supplement. Together, they are the worker's "remuneration". The supplement can then be considered part of the worker's "social wage" or income replacement, as opposed to being primarily rehabilitative in nature.

In this case, since the second accident was a separate event, rather than a recurrence of the first compensable accident, the calculation of the worker's earnings did not relate to the period to the 1981 accident and therefore only the time prior to the second accident should be considered.

The worker was directed and encouraged by the Board to take the position with the courier company. He received a specific amount of wages and a similar amount as a wage loss supplement while working for a particular employer at a particular job. In the circumstances, the wage loss supplement paid to the worker represented subsidized wages or a reward for the worker's services and can be considered "earnings".

The actual salary paid by the employer did not reflect the worker's true earnings at the time of the second accident. On the real merits and justice of the case, the wage loss supplement was an employment-related payment which should be included in the worker's earnings pursuant to section 43(1) of the Act. [18 pages]

WCAT Decisions Considered: Decision No. 765 (1988), 9 W.C.A.T.R. 21; Decision No. 915 (1987), 7 W.C.A.T.R.1; Decision No. 1264/87 (1989), 12 W.C.A.T.R. 18; Decision No. 934/88 (1989), 11 W.C.A.T.R. 196; Decision No. 994/88 (1989), 12 W.C.A.T.R. 61;

Other Statutes Considered: Employment Standards Act, R.S.O. 1980 c.137,

s.1(p); Unemployment Insurance Act, R.S.C. 1985 c.U-1, C.R.C. 1978 c.1576, s.57;

Board Directives and Guidelines: Claims Adjudication Branch Procedures Manual, Document no. 33-20-02; Policy, Supplementary Benefits under Section 45(5) of the Act, Board Minute 1(a), Nov. 16 1987, p.52; Addendum to Section 45(5)

Policy, Administrative Guidelines on the Worker Adjustment Supplement, Dec. 3, 1987.

Cases Considered: Cote v. Canada Employment and Immigration Commission (1986), 13 C.C.E.L. 225 (F.C.A.); Visan v. Minister of National Revenue (1983), 46 N.R. 494 (F.C.A.); Bell Canada v. Quebec (Commission de la sante et de la securite du travail)(1988), 51 D.L.R. (4th) 161 (S.C.C.); Re Bell Air Conditioning (1987), E.S.C. 145 (Referee), R. v. Postmaster General (1876) 1 Q.B.D. 658

DECISION NO. 880/88 (27/04/90) Starkman Heard Jago

Apportionment (pensions) - Pensions (assessment) (preexisting condition) - Pensions (assessment) (eye) - Pensions (assessment) (glaucoma) - Board Directives and Guidelines (pensions) (preexisting condition) - Causation (thin skull doctrine) - Words and phrases (results from s. 45(1)).

The worker suffered a non-compensable left eye injury in 1979, resulting in vision measured at 20/200. In 1984, he suffered a compensable accident resulting in blindness in the left eye. The Board determined that the Rating Schedule for 20/200 vision was 12%, that the Schedule for blindness was 16% and that the worker was entitled to the 4% difference between the two.

Section 45(1) provides for pensions where permanent disability results from the injury. There is a difference between the "thin-skull" situation, where the worker has a propensity to perhaps develop a certain disability, and the situation where the worker has an ascertained preexisting disability. The Panel found that s.45(1) provided that the Board can and must pay pensions for disabilities that result from work

injuries and that the Board was required to apportion benefits between compensable and non-compensable disabilities.

In this case, there was evidence that the testing instruments used may not have been completely reliable and that the worker's eyesight may have been greater than indicated. Therefore, the Panel applied the Board guidelines for determining apportionment where the prior disability is not measurable. Considering the prior disability to be moderate, the worker was entitled to 75% of the 16% assessment for blindness, which came to an award of 12%.

The worker was diagnosed with glaucoma. The vision loss caused by the glaucoma was compensated for by the 12% pension. However, the worker was entitled to assessment for a pension for headaches and dizziness caused by the glaucoma. [18 pages]

WCAT Decisions Considered: Decision No. 915 (1987), 7 W.C.A.T.R. 1

Other Statutes Considered: Workers' Compensation Act, R.S.N.S. 1967 c.343, s.7(2); Workers' Compensation Act, 1968 (B.C.) c.59, s.6(5)

Board Directives and Guidelines: Claims Adjudication Branch Procedures Manual, Document no. 33-02-20

Cases Considered: Decision No. 270 (1978), 4 B.C.W.C.R. 6; Hawker Siddley Canada Ltd. v. Berry (1977), 21 N.S.R. (2d) 41; King v. Goodhew (Ont. S.C., 1988, unreported); Pirov v. Bains and Johan (B.C.C.A., Jan. 28, 1986, unreported); Workers' Compensation Appeal Board v. Penny (1980), 38 N.S.R. (2d) 623

DECISION NO. 688/89 (27/04/90) Signoroni Fox Apsey

Apportionment (standard of proof) - Transfer of costs - Negligence (duty of care).

The worker's employer appealed a decision of the Hearings Officer denying a transfer of costs of an accident to another employer. The worker was a truck driver. He was dispatched by his employer to the premises of the other employer to make a pick-up. He parked the truck along a lane way, and tripped over a tree stump covered by uncut grass along the side of the laneway.

Some prior Tribunal decisions found that clear negligence was necessary before apportionment under s.8(9) could be considered. The Panel found that this principle of clear negligence was not consistent with the clear statutory language in s.8(9). Rather, the concept of negligence should be given the same interpretation as developed in common law.

In this case, the second employer had a duty to take reasonable care to protect the worker from injury. On the evidence, the Panel found that there was no breach of that duty of care. Because of its narrowness, the area of the accident could not reasonably be seen as a travelling path. It was questionable why the worker parked in that area. In any event, he had room to walk in the laneway itself.

The appeal was dismissed. [13 pages]

WCAT Decisions Considered: Decision No. 716/87 (1987), 6 W.C.A.T.R. 242; Decision Nos. 213/88, 17/89/2, 586/89

Other Statutes Considered: Occupiers' Liability Act, R.S.O. 1980 c.322

Cases Considered: Decision No. 65 (1974), 1 B.C.W.C.R. 270; Decision No. 114 (1975), 2 B.C.W.C.R. 85; Donoghue v. Stevenson, [1932] A.C. 562

DECISION NO. 547/88 (27/04/90) Strachan Higson Jago*Continuity (of treatment).*

The worker suffered a back strain in November 1980. The worker was not entitled to benefits for a lay-off in 1985. There was a lack of treatment from 1981 to 1985. In addition, the worker's condition was not related to a change in job duties in 1983. An issue as to a relationship between the condition and the worker's work during the week before the lay-off was still under consideration at the Board. [8 pages]

DECISION NO. 665/89 (01/05/90) Bigras Fox Jewell*Exposure (asbestos) - Asbestosis - Cancer (lung).*

The employer appealed a decision of the Hearings Officer confirming entitlement for the deceased worker. From 1936 to retirement in 1973, the worker was a mould maker for a glass manufacturer. In 1981, the worker was found to have a fibrosis condition of the lung, diagnosed as asbestosis. He was awarded a 20% pension. In 1982, he underwent surgery for removal of a cancerous tumour of the adeno cells of the lung.

On the evidence, the Panel found that the worker made use of asbestos cloth to handle hot moulds and worked in close proximity to asbestos cloth in a poorly-ventilated work area from 1936 to the late 1950s. Asbestos continued to be machined and handled in open areas in the same part of the building where the worker worked until his retirement in 1973.

One medical expert diagnosed the worker's fibrosis as asbestosis. The other expert diagnosed idiopathic alveolitis. The four criteria in making a diagnosis of asbestosis are adequate history of exposure, x-ray changes, crackles in the chest and pulmonary function abnormalities. With the exception of the history of exposure, there is very little difference in a diagnosis of alveolitis.

The Panel found that the worker's lung fibrosis was, in fact, asbestosis. The employer's expert based his opinion on very low exposure, as found by the Board's investigator. However, the Panel found the exposure was significantly higher. There were other factors indicative of asbestosis, such as chrysotile fibres and pleural thickening.

Further, the exposure to asbestos, or the scar tissue (asbestosis) in the lung, was a significant contributing factor to development of the lung cancer.

The appeal was dismissed. [27 pages]

DECISION NO. 265/90 (01/05/90) Starkman McCombie Ronson*Accident (occurrence).*

The worker was entitled to benefits for a shoulder condition. Considering the type of work performed by the worker and prompt reporting of the injury, the Panel was satisfied that an accident occurred. [5 pages]

DECISION NO. 263/90 (01/05/90) Starkman McCombie Clarke

Withdrawal (of appeal).

The worker was appealing denial of ongoing benefits for disabilities resulting from a specific incident. At the hearing, the worker took the primary position that her condition was a disablement. The issue of disablement had not been considered by the Hearings Officer.

The worker withdrew her appeal so that the Board could adjudicate the disablement issue. [4 pages]

DECISION NO. 724/89 (01/05/90) McGrath Cook Meslin

Accident (occurrence) - Benefit of the doubt - Psychotraumatic disability.

Considering the worker's immediate report of the incident, the prompt seeking of medical attention and the benefit of the doubt principle, the Panel accepted that the worker did suffer an unwitnessed slip and fall accident at work, in April 1984.

The worker was entitled to benefits until July 1985. The fact that the worker initially complained of an ankle injury, which turned out to be minor, did not mitigate against the finding that the worker was eventually diagnosed as having a lumbosacral strain arising from his fall. The Panel accepted the worker's explanation that he had trouble communicating with the first doctor and that it was the second doctor's questioning which established the connection between the back pain and the fall.

The worker's disability which arose from the back pain, had both an organic and non-organic component. Though the organic component played a large part, the medical evidence did not indicate malingering. Since the two components were so intertwined, they could not be separated and the Panel was satisfied that the work accident significantly contributed to the disability as a whole. While the employer's argument, that the lengthy duration of the disability was a psychogenic manifestation of other problems not related to work, might have some merit on an SIEF application, it was insufficient to disentitle the worker to benefits. [8 pages]

WCAT Decisions Considered: Decision No. 915 (1987), 7 W.C.A.T.R. 1

DECISION NO. 992/89 (01/05/90) Bigras Beattie Ronson

Continuity (of symptoms) - Disc, herniated.

The worker suffered a compensable lumbar back injury, in May 1967, that was diagnosed as an acute, severe sprain. X-rays at the time only revealed slight disc degeneration at L2-3, but this was not the cause of the worker's problem. In February 1984, the worker underwent surgery which revealed, for the first time, a ruptured disc at the L4-5 level. X-rays taken shortly before the surgery again only revealed the L2-3 disc degeneration, which had not progressed since 1967.

Medical treatment between 1967 and 1984 was confined to chiropractic treatment, but it began shortly after the first accident. There was clear evidence that the worker's foreman and co-workers were aware of the worker's continuing back problems and that they accommodated the situation.

The only problem with the worker's back ever shown to exist was the ruptured disc. There was no alternative reason for the worker's pain following the 1967 accident. The Panel thus found that the disc herniation which required the 1984 surgery resulted from the 1967 accident. The worker was entitled to benefits from January 1984, when he was taken from his home, to hospital, by ambulance. [7 pages]

DECISION NO. 281/90 (02/05/90) Onen Ferrari Apsey

Supplements, temporary (rehabilitative purpose) - Suitable employment.

The worker suffered a back injury for which she was awarded a pension. A supplement was terminated after the worker discontinued modified work.

The employer was willing to accommodate the worker's return. The Board's vocational rehabilitation counsellor worked closely with the employer in modifying the employment to suit the worker's disability. The Panel found that the modified work was suitable.

The worker continued to look for work and was in contact with her rehabilitation counsellor. However, the Panel found no rehabilitative purpose in continuing the supplement, considering her disability, job skills, age and lack of success in finding light work.

The worker was not entitled to a temporary supplement. The Panel made no ruling regarding an older worker supplement. [8 pages]

DECISION NO. 292/90 (02/05/90) Kenny Cook Apsey

Commutation (business investment) - Commutation (debt liquidation).

The worker appealed denial of full commutation of his pension in order to pay off a bank loan and to buy heavy equipment to perform a haulage contract.

The Panel had serious doubts whether the worker would be able to operate the equipment on a full time basis, considering his disability. In any event, he already had some heavy equipment which would be sufficient to perform the contract.

The worker had been able to make loan payments until now. There was no reason to jeopardize his pension income in order to pay off the loan.

The appeal was dismissed. [6 pages]

DECISION NO. 215/87R (02/05/90) Signoroni Klym Apsey

Reconsideration (new evidence).

In Decision No. 215/87, the worker was denied benefits for a hernia. The worker's request to reconsider Decision No. 215/87 was denied. New medical reports lacked medical data in support of the opinions advanced. One doctor did not examine the worker until six months after the incident in question. The other doctor took a position that was inconsistent with the position he had taken previously. [6 pages]

WCAT Decisions Considered: 215/87

DECISION NO. 1039/89 (02/05/90) Bigras Beattie Meslin

Commutation (vehicle purchase).

The Panel granted partial commutation of the worker's pension, valued at about \$62,000, for the purpose of buying a new car. The Board denied the commutation since the worker was unemployed and it did not want to disturb his only reliable source of income. However, now the worker had a firm job commitment for a job

that required considerable driving. The alternative arrangement was to continue leasing an older car but this was not a favourable arrangement since it left the worker with an older car and required his entire monthly pension for payments. [5 pages]

DECISION NO. 1170/87 (02/05/90) Bradbury Lankin Preston

Exposure (formaldehyde) - Environmental hypersensitivity - Causation (medical evidence) (standard of proof).

The worker appealed a decision of the Appeals Adjudicator denying continuing entitlement. While working in a box-making factory, she began to experience headaches, soreness in her eyes, facial swelling and nasal congestion. She laid off in January 1982. She received benefits, including a 5% provisional pension which was discontinued after one year in October 1984.

The worker was exposed to chromates, biphenyls and formaldehyde. The worker tested positively to formaldehyde, to some food and other allergens but was not tested for reaction to other chemicals in the workplace.

The Panel approved of Decision No. 333/89 regarding factors to be considered in determining a relationship between irritating or sensitizing substances at work and an ongoing condition. In this case, there was a strong temporal relationship between work exposure and symptoms. There was no family or personal history of allergies. The worker never returned to her previous state of health since the work exposure. By October 1984, she was able to control her environment and diet to the point where she was no longer reacting severely from food allergies but she continued to have problems with the nose, upper respiratory tract, eyes and ears.

There was insufficient evidence from a scientific point of view to establish a clear causal relationship between the work exposure and ongoing symptoms. However, the Tribunal cannot wait for scientific certainty. It must make its decision on the basis of existing evidence. The Panel concluded that the work exposure was a significant contributing factor to her sensitization and to the ongoing effects on her condition. The worker was entitled to continuation of the 5% pension. The appeal was allowed. [16 pages]

WCAT Decisions Considered: Decision No. 333/89 (1989), 11 W.C.A.T.R. 326

DECISION NO. 393/89 (02/05/90) Hartman Preston Fox

Medical opinion (disc, herniated).

The worker was not entitled to benefits for surgery in 1981 that disclosed a herniated disc at the L5-S1 level. It was not causally related to a June 1977 compensable injury sustained by the worker when a large piece of falling rock hit his shoulder. The worker complained of soreness but did not lose time until two weeks later. It was dizziness, not back pain that led the worker to seek medical attention. An ear specialist suggested the possibility of a herniated disc, but this was not confirmed by an orthopaedic specialist. The worker had already suffered a number of injuries to his back by 1977.

The Panel concluded that the worker's low back pain commencing in October 1977 was not evidence of a herniated disc, but rather was general in nature. A second major trauma was not required to explain the herniated disc. The Panel accepted medical information that it could have been caused by normal daily activities operating on weakness due to age and normal wear and tear. Major trauma was required only in youths to produce a disc protrusion. [8 pages]

DECISION NO. 296/90 (03/05/90) Strachan Fox Meslin

Experience rating (CAD-7) - Discretion, Board (experience rating) - Employer (successor rights) - Detrimental reliance - Jurisdiction, Tribunal (appealable issue).

The employer appealed a decision of the Hearings Officer denying a CAD-7 experience rating assessment for 1987. The appellant corporation had two shareholders. When one decided to retire in 1987, the other incorporated a new company and entered into an asset purchase with the appellant, including all assets, undertakings, existing building contracts and responsibility for all employees. The new company established a new WCB account.

Under the terms of CAD-7, the Board has sole discretion to determine proper application of the plan in cases of reorganization. This provision could not deprive the Tribunal of its jurisdiction.

The Board refused a CAD-7 assessment because of a provision that requires a firm's participating firm/rates to be open on December 30 of the prior year.

The Panel found that the new company carried on the business and undertaking of the old company. The same workers and supervisors were employed. The accident experience of the business carried on by the old company became, in essence, the accident experience of the successor company. This business reality would have been recognized by the Board had the new company assumed the WCB account number.

On the evidence, the Panel found that the company consulted a WCB Review Specialist and relied to its detriment upon that Specialist's advice, that a CAD-7 rebate would be pro-rated for 1987. There was no ulterior motive on the part of the new company since the accident cost record of the old company was good. The intent and purpose of CAD-7 was consistent with treating the new company as a successor to the old company. The appeal was allowed. [8 pages]

WCAT Decisions Considered: Decision No. 915 (1987), 7 W.C.A.T.R. 1; Decision No. 86/89

DECISION NO. 294/90 (03/05/90) Kenny Cook Apsey

Continuity (of treatment) - Disc, degeneration (lumbar).

In 1977, the worker fell five or six feet and suffered a back injury. He returned to work until 1987, when he laid off due to a back disability resulting from disc degeneration at L3-4 and L4-5.

The worker was entitled to benefits for the lay-off in 1987. Medical evidence indicated that it is possible for an injury to result in degenerative change, especially where the degeneration was not present at the time of the injury, there was a significant injury and there is marked localized degeneration after the injury. Considering the nature of the fall in 1977 and the change in x-ray findings, it was possible that the 1977 accident caused the degenerative changes. There was a lack of continuity of treatment but the Panel was satisfied that the worker had continuing back pain. In addition, an accident in 1986 aggravated the condition. [9 pages]

DECISION NO. 638/89 (03/05/90) Bigras Fox Shuel

Temporary partial disability (level of benefits) - Intervening causes - Issue setting - Chronic pain - Pensions (assessment) (back).

The worker fell and injured his back in May 1981. The Board awarded him temporary benefits from December 1981 to March 1986, but only at the 50% level, on the basis that part of his disability resulted

from non-compensable injuries. In March 1986 the worker was granted a 10% pension. The worker appealed, seeking full benefits from December 1981 to March 1986 and an increase in his pension.

In May 1981 attention was focused on the worker's thoracic spine, while the worker's disability subsequent to December 1981 involved his lumbar back. However, the medical evidence indicated that the worker had suffered a compression fracture of the L1 vertebra in May 1981 which was missed at the time.

The worker sustained a number of falls subsequent to December 1981 which may have aggravated his lumbar condition. However, all but one of the falls could be attributed to consequences of the compensable condition. The worker's leg "giving way" was a credible symptom of his condition. A fall on ice was not attributable to that condition, but it did not affect his compensable disability. There were thus no intervening factors and the worker's lower back disability was entirely attributable to the May 1981 accident. Because of the initial failure to diagnose the compression fracture, the worker did not receive rehabilitation or medical assistance from the Board until 1986. The worker had been looking for work himself, before then and subsequently was co-operative with rehabilitation. He was entitled to full temporary benefits from December 1981 to March 1986.

A November 1987 Hearings Officer decision, refused to deal with the chronic pain issue raised by the worker's former representative. On the appeal of a July 1988 Hearings Officer decision, dealing with the levels of temporary and pension benefits, the Tribunal sent the matter back to the Board for adjudication of the chronic pain issue. In a January 1990 decision, a Hearings Officer denied entitlement for chronic pain. The worker, who was unrepresented, did not raise the chronic pain issue on the present appeal. The Panel nonetheless had jurisdiction to deal with both organic and non-organic causes of the worker's disability.

There was no evidence of chronic pain in this case. Reports relating to symptoms inconsistent with organic findings, the worker's pre-occupation with his symptoms and his dependency on compensation payments, were made before the discovery of the compression fracture. Once the true nature of the worker's injury was determined there were no further medical reports commenting on psychogenic reactions. There was no exaggeration of symptoms or functional overlay.

Considering the finding that the worker's leg tended to "give way" due to the back condition, and adding to the worker's disability the symptoms which the Board had attributed to psychogenic factors, the worker's pension rating should be doubled to 20%. [18 pages]

WCAT Decisions Considered: Decision No. 915 (1987), 7 W.C.A.T.R. 1; Decision No. 638/89I (1989), 12 W.C.A.T.R. 221

Board Directives and Guidelines: Claims Adjudication Branch Procedures Manual, Document no. 33-02-22

DECISION NO. 420/88 (03/05/90) Bradbury Higson Jago

Apportionment (pensions) - Pensions (assessment) (preexisting condition) - Retroactivity - Retrospectivity - Earnings basis (maximum) - Words and phrases (results from, s. 45(1)) - Hearing loss.

The worker appealed a decision of the Appeal Board denying further entitlement for hearing loss. The worker was a miner from 1939 to 1942, then joined the Air Force. He suffered hearing loss in the Air Force. The Canadian Pension Commission decided that three-fifths of the worker's hearing loss resulted from aggravation caused by work with the Air Force and awarded a pension for that portion. From 1946 to 1961, the worker worked for a second employer as a mechanic in a noisy environment. The worker laid off in 1961 due to total deafness. The Appeal Board granted a full 30% pension for hearing loss, less the Air Force pension, retroactive to 1961.

Prior to amendments to the definition of industrial disease in 1947, hearing loss was not compensable. These amendments did not apply retroactively but did apply retrospectively, so that the worker, if otherwise entitled, could claim benefits back to 1947 for hearing loss caused by prior work exposure as a miner.

Prior to amendments in 1973, the industrial disease provision required that a worker be disabled from

earning full wages at the work at which he was employed. Since the worker was able to work at full wages at the second employer until 1961, the Appeal Board determined correctly that he was not entitled to a pension until 1961.

The Board calculated the pension on the basis of the \$5,000 maximum earnings level allowed at the time of the lay-off in 1961. Amendments increasing the earnings maximum were neither retroactive nor retrospective, according to the provisions of the amending legislation. Therefore, the \$5,000 earnings basis was correct.

A pension is payable where permanent disability results from the injury. The Canadian Pension Commission made a reasonable estimate of the hearing loss resulting from the Air Force. The Board did not err in discounting the pension by the amount received for non-compensable aggravation of his hearing loss in the Air Force.

The appeal was dismissed. [17 pages]

WCAT Decisions Considered: Decision No. 765 (1988), 9 W.C.A.T.R. 21; Decision No. 915A (1988), 7 W.C.A.T.R. 269; Decision No. 79/87 (1987), 6 W.C.A.T.R. 104; Decision No. 653/88

Other Statutes Considered: Workmen's Compensation Amendment Act, 1947, S.O. 1947 c.119 s.1(2); Workmen's Compensation Amendment Act, 1973 (No. 2), S.O. 1973 c.173 s.9(1); Workmen's Compensation Amendment Act, 1968, S.O. 1968 c.143 ss.11, 23

Board Directives and Guidelines: Claims Services Division Manual, s.108(2), p.235, Directive 1
Cases Considered: Brosseau v. Alberta Securities Commission (March 28, 1989, S.C.C.); Re Sanderson (1979), 4 O.R. (2d) 429 (C.A.); Sun Alliance Insurance Co. v. Angus, [1988] 2 S.C.R. 256; Sunshine Porcelain Potteries Co. Ltd. v. Nash, [1961] A.C. 927; Workers' Compensation Board v. Penny (1980), 112 D.L.R. (3d) 95 (N.S.C.A.); Strachan Shipping Co. v. Nash, 782 F. 2d 513 (1986)

DECISION NO. 1048/89 (03/05/90) Hartman Robillard Howes

Supplements, temporary (rehabilitative purpose) - Board Directives and Guidelines (temporary supplements) (policy change).

The worker suffered a compensable injury in March 1985 for which he was awarded a pension. He received a temporary supplement from February 1987 to July 1988 but was denied a supplement thereafter. The worker had found modified work with a new employer in December 1985 and was still with that employer.

The old Board policy on supplements was basically a wage top-up based on a comparison of pre-accident and post-accident earnings. Extension beyond 12 months was possible, after a complete review, where the supplement would assist in successful rehabilitation. The policy changed in November 1987 to a work adjustment supplement, focusing on the comparison of pre-accident and post-accident earning capacity, with the emphasis on rehabilitation. The new policy also suggested that workers already receiving supplements would be reviewed, when those benefits expired, using the new policy.

The worker's circumstances were not given a complete review, as required by the Board policy, prior to termination of the benefits. It was not until the fall of 1988 that Rehabilitation Services completed its involvement with the worker after suggesting retraining which was rejected by the worker. At this point, it became clear that the worker did not wish to become involved in rehabilitation services and that there was no rehabilitative purpose to continuing the supplement. The worker was entitled to the supplement until November 1988. [12 pages]

WCAT Decisions Considered: Decision No. 915 (1987), 7 W.C.A.T.R. 1; Decision No. 466/89 (1989), 11 W.C.A.T.R. 369; Decision No. 916/89 (1989), 12 W.C.A.T.R. 279

Board Directives and Guidelines: Claims Adjudication Branch Procedures Manual, Document no. 33-20-02; Claims Services Division Manual, s.45(5), p.134, Directive 1; Policy on Supplementary Benefits under s.45(5) of the Act, Board Minute 1a, November 16, 1987, p. 52; Addendum to s.45(5) Policy, December 3, 1987

DECISION NO. 15/90R (04/05/90) Bigras McCombie Sutherland*Reconsideration (new evidence).*

An application to reconsider Decision No. 15/90 was denied. The issue in Decision No. 15/90 was entitlement for chronic pain. New evidence submitted by the worker was concerned with degree of organic disability, which was not an issue before the Panel. [3 pages]

WCAT Decisions Considered: Decision No. 95R (1989), 11 W.C.A.T.R. 1; Decision Nos. 72R, 72R2

DECISION NO. 261/90 (04/05/90) Bigras Lebert Clarke*Pensions (arrears).*

The worker suffered a knee injury in 1964. In June 1965, he underwent knee surgery. In April 1984, he requested a pension for his knee disability. In 1985, he was awarded a 5% pension retroactive to January 1984.

The Board relied on a report in July 1965, which stated that complete recovery was expected. However, the worker was still undergoing active treatment at the time. Although there was lack of treatment from later in 1965 to 1984, the Panel found that the worker continued to have a knee disability.

The worker was entitled to the 5% pension retroactive to June 1966. This was one year after the surgery and the time which, according to Board procedure, the worker should have been examined to determine whether a pension was warranted. At that point, the worker still had symptoms but was no longer under active treatment. [5 pages]

WCAT Decisions Considered: Decision No. 928/88F

Board Directives and Guidelines: Claims Adjudication Branch Procedures Manual, Document no. 33-20-13;

Medical Branch Procedures Manual, Document no. 43-09-01

DECISION NO. 157/90 (04/05/90) Hartman Fox Clarke*Continuity (of symptoms) - Accident (occurrence).*

The worker suffered a compensable low back injury in 1978. X-rays taken at the time revealed degenerative changes in the lower lumbar spine. The worker's onset of back pain in 1984 was more likely due to deterioration of the preexisting degenerative disc condition, than failure to recover from the 1978 accident. Any aggravation of the underlying condition by the 1978 accident had resolved. There was no medical evidence that the accident had triggered the deterioration of the underlying condition.

The worker performed his regular duties, without modification, from 1978 to 1984. At the hearing, the worker claimed there was sudden onset of pain in 1984 as a result of duties which required heavier lifting. In 1984, the onset was consistently described as a gradual onset of pain, with no mention of lifting. Though the worker was likely being honestly vague at the time of the hearing, his earlier evidence was preferable as an accurate recollection of events. The worker was not entitled to benefits. [5 pages]

DECISION NO. 171/90 (07/05/90) Bigras Rao Meslin

Disablement (repetitive work) - Spondylosis (cervical) - Tendonitis (shoulder)

The employer appealed a decision granting the worker entitlement for a shoulder and cervical condition. The worker's neck condition was diagnosed as cervical spondylosis and the shoulder problem as supraspinatous tendonitis.

The worker's cervical condition appeared when she returned to work in 1980 and progressed while she was employed as an assembly operator. The work involved considerable repetitive movement of the head. She had to look downward most of the time and had to turn her head considerably and frequently. The motions had to be repeated several hundred times an hour. The worker attributed her shoulder pain to work that required putting six hundred parts per hour in a tray.

It was significant that the worker's layoff due to increased pain came in the year that her work shifts were altered from five eight-hour shifts weekly to four ten-hour shifts weekly. The employer's appeal was denied. [10 pages]

DECISION NO. 211/90 (07/05/90) Moore Lebert Seguin

Access to worker file, s. 77 (issue in dispute) (initial entitlement).

Access to the worker's file was granted to the employer. The issue in dispute was initial entitlement. The issue in dispute should be interpreted broadly to include subsidiary issues. In this case, there were subsidiary issues concerning subsequent entitlement. [4 pages]

DECISION NO. 142/90 (07/05/90) Carlan McCombie Ronson

Delay (reporting injury) - Disability (disabled from working).

The worker, a piece-work seamstress, claimed that she bent down to pick up a gown and that as she stood up she experienced back pain. The Panel found that there was insufficient evidence to establish that she sustained a work accident that disabled her.

There was a delay of several months in reporting the injury to the employer. There was no direct reporting to the Board even though the worker had been in contact with her union and her MPP. The worker was suffering from spondylitic changes not usually brought on by trauma. There was no significant medical evidence relating the worker's condition to her work. One of the worker's highest earning periods was a week during half of which she would have been disabled, according to her own evidence. There was thus doubt about her inability to perform work after the alleged accident. [6 pages]

DECISION NO. 260/90 (08/05/90) Faubert Ferrari Meslin

Temporary partial disability.

The worker suffered a finger injury on August 8, 1980. The Panel found that the worker was temporarily partially disabled from August 21, 1980, when his employment was terminated, to October 1980, when he started a new job. He had an open wound on the tip of his ring finger which required time to heal. Use of his hand in work could have delayed or interfered with the healing process. [6 pages]

DECISION NO. 131/90 (08/05/90) Chapnik Robillard Nipshagen*Availability for employment (job search).*

The worker suffered a back and shoulder injury in 1985. The Panel found that the worker was temporarily partially disabled from February 1987 to December 1987 and entitled to 50% benefits. The worker had a long but vague job search list. Considering inconsistencies in her evidence, the Panel found that the worker did not make a sincere effort to find work. [8 pages]

WCAT Decisions Considered: Decision No. 59 (1987), 5 W.C.A.T.R. 17; Decision No. 137 (1987), 4 W.C.A.T.R. 87

DECISION NO. 177/90 (08/05/90) Chapnik Beattie Jago*Continuity (of symptoms).*

The worker was entitled to benefits for a lay-off in 1987. There was no new accident in 1987. However, the Panel was satisfied that the lay-off was related to a compensable accident in 1985. [8 pages]

DECISION NO. 225/90 (08/05/90) Faubert Robillard Apsey*Continuing entitlement - Rehabilitation, vocational (academic training) - Rehabilitation, vocational (suitability of program) (program chosen by worker).*

The worker suffered a back injury in 1987. The Board granted 50% benefits from January 1988 to May 1988 and denied benefits thereafter.

On the evidence, the worker was no longer temporarily partially disabled subsequent to May 1988 and was not entitled to benefits.

From January 1988 to May 1988, the worker was entitled to full benefits. He returned to school for retraining. Although the Board denied sponsorship for the program, the return to school was in itself a rehabilitation measure which would enhance his opportunity for suitable employment in the long term and was suitable to his abilities and aptitudes. [8 pages]

WCAT Decisions Considered: Decision No. 375/89 (1989), 11 W.C.A.T.R. 336

Board Directives and Guidelines: Claims Adjudication Branch Procedures Manual, Document no. 33-19-07

DECISION NO. 278/90 (08/05/90) Signoroni Lebert Barbeau*Procedure (absent parties) - Withdrawal (of appeal).*

The worker was appealing level of pension for an ankle disability and entitlement for a back condition. The worker lived out of the country and did not attend the hearing. The worker had a psychiatric condition and there was the possibility that this could affect his competence to instruct his representative.

The appeal was considered withdrawn. Further proceedings should not be scheduled unless the worker's representative confirms in writing that: the worker was aware of the Tribunal's power to require him to testify and the inferences that could be drawn from refusal to testify; that he had written instructions to proceed; that he was satisfied that the worker was competent to give instructions. [5 pages]

WCAT Decisions Considered: Decision No. 241 (1986), 1 W.C.A.T.R. 93

DECISION NO. 254/90 (08/05/90) Kenny Cook Jago

Delay (onset of symptoms) - Cerebellar dysfunction.

The worker fell from a ladder in 1979, suffering leg and low back injuries. The worker was not entitled to benefits for cerebellar dysfunction, the symptoms of which were ataxia, some speech impairment and tremors. On the evidence, the primary injury in the accident was to the worker's leg. Any head injury was minor. There were preexisting symptoms of dysfunction. Medical evidence did not support entitlement. [8 pages]

DECISION NO. 54/90 (08/05/90) Faubert Cook Howes

Continuity (of treatment).

The worker suffered a low back strain in 1969 and received benefits for 10 days. The worker was not entitled to benefits in 1987 for back surgery. Considering lack of continuity of treatment unit 1977, the ability to lead an active life and do heavy work, the Panel found that the worker's compensable condition had resolved by the time he returned to work in 1969. [8 pages]

DECISION NO. 322/90 (09/05/90) Strachan Robillard Preston

Access to worker file, s. 77.

Access to the worker's file was granted to the employer. [3 pages]

DECISION NO. 314/90 (09/05/90) Bradbury Lebert Seguin

Continuing entitlement.

The worker suffered a back injury in 1981 and received full benefits until September 1984. After that, he received partial benefits and then a pension until May 1986, when full benefits were restored.

The worker was entitled to full benefits from September 1984 to May 1986. His condition remained the same during the entire period and he was under active medical treatment. In addition, prescribed pain medications, to which the worker became dependent, contributed to his condition. [4 pages]

DECISION NO. 93/90 (09/05/90) Bigras Lebert Nipshagen

Class of employer (logging) - Class of employer (road construction).

The employer company was engaged in trucking, equipment rental and road building. The company was awarded a contract for construction of a bush access road. The Board assessed this project under the logging classification in Class 1 of Schedule 1 rather than the class for road construction in Class 21.

The road ended in the bush and was being used primarily by loggers. However, the road was constructed to a higher standard since it was intended that it would be used by others as well, such as outdoors people and cottagers. The company carried out all aspects of the job except the clearing of the right of way, which

consisted of cutting and clearing of trees, and which was subcontracted to another company.

The Panel found that the company should be assessed for this contract under Class 21, Rate 736 for road construction. [8 pages]

Regulations Considered: Reg. 951, Schedule 1 class 1, class 21

Board Directives and Guidelines: Employer Assessment Policies Manual, Document no. 03-01-00; Document no. 03-02-01

DECISION NO. 141/90 (09/05/90) Onen Robillard Meslin

Delay (onset of symptoms).

The worker suffered left hand injuries in May and September 1977 and a low back injury in May 1979. The worker was not entitled to benefits for a neck condition. On the evidence, the Panel found that the worker did not suffer a neck injury in any of the accidents. The preponderance of medical opinions indicated that the worker was suffering from a psychological problem and that this was the most likely explanation for the pain. Supportive medical opinions did not explain the relationship of the condition to the accidents. [12 pages]

DECISION NO. 315/90 (09/05/90) Bradbury Lebert Seguin

Pensions (assessment) (back) - Chronic pain.

The worker was receiving a 40% pension for organic back disability and had been denied entitlement for chronic pain.

The worker had undergone back surgery since his last pension assessment and his condition might have deteriorated. The worker was entitled to be reassessed for his organic condition. The worker was not entitled to benefits for chronic pain since the pain was primarily organic in origin. [5 pages]

DECISION NO. 255/90 (09/05/90) Bigras Drennan Apsey

Arising out of employment (reasonably incidental activity test) - Accident (occurrence) - Delay (reporting injury).

The worker claimed that she suffered low back pain while bending over to remove her safety shoes at the end of her shift. Safety shoes were compulsory on the job and the worker was allotted time during work hours to put on and remove the shoes. The Panel found that changing shoes was part of the requirements of the job and, therefore, was an act arising out of employment.

On the evidence, the Panel found that the accident did occur, as described by the worker. Delay of a few days in reporting the injury was explained by the fact that the worker thought the injury was minor. [9 pages]

WCAT Decisions Considered: 26/87

Board Directives and Guidelines: Operational Policy Manual, Document no. 03-02-02

DECISION NO. 145/90 (10/05/90) Bigras Fox Apsey

Medical examination (section 21) - Procedure (section 21) (access to worker file) - Procedure (absent parties).

The worker applied under s.21 to determine whether she was required to attend a medical examination. However, neither the worker nor her representative were present. The worker telephoned shortly before the hearing to say she was sick. When contacted, the representative stated that he had forgotten about the hearing. The employer argued that the worker's failure to attend should be viewed as a withdrawal of her objection. However, the Panel decided to proceed with the hearing. By failing to attend or show reasonable cause for her absence, the worker forfeited her right to be heard in person.

The employer submitted that it requested the examination not under s.21 but, rather, under its occupational fitness assessment program. The Panel found that the terms of the request fell within s.21 and that, therefore, the Tribunal had jurisdiction. However, the Panel's decision would have no effect on the worker's obligations under any other worker-employer arrangements not within the provisions of the Workers' Compensation Act.

The employer had not applied for access under s.77. Therefore, it could not be shown that the examination was important to achieving the employer's compensation goal. The worker's objection was upheld. [8 pages]

WCAT Decisions Considered: Decision No. 174 (1986), 2 W.C.A.T.R. 96; Decision No. 185 (1986), 3 W.C.A.T.R. 110; Decision No. 696/88 (1989), 10 W.C.A.T.R. 308; Decision No. 981/87

Cases Considered: Canada Post Corp. v. C.U.P.W. (1989), 70 O.R. (2d) 394

DECISION NO. 865/89 (11/05/90) Carlan Lebert Meslin

Pensions (assessment) (back) - Pensions (marked life disruption) - Psychotraumatic disability - Supplements, temporary.

The worker suffered back injuries in 1976 and 1979 for which he was awarded a 15% pension. The worker appealed decisions of Hearings Officers denying an increase in the pension, denying benefits for psychotraumatic disability and denying a temporary supplement subsequent to June 1988.

The worker's disability was primarily organic. Comparing the worker's disability to the rating of 30% for total immobility of the lower back, the Panel found that the worker's 15% rating was accurate.

Life disruption was not a factor in assessing an organic back disability. Pensions are based on impairment of earning capacity. Marked life disruption is considered in the chronic pain schedule because of the difficulties in assessing non-organic disabilities. It is a collection of symptoms which identifies a condition which impairs the worker's capacity to earn.

The worker was not entitled to benefits for psychotraumatic disability. He may have been depressed at times following the accident but he received full benefits during those periods. Any ongoing depression was not severe and did not disable the worker.

The worker was not entitled to further supplementary benefits. He had received sufficient benefits to allow for adjustment to diminished capacity to earn. There was no further rehabilitative purpose to a supplement.

The appeal was dismissed. [14 pages]

WCAT Decisions Considered: Decision No. 915 (1987), 7 W.C.A.T.R. 1

Board Directives and Guidelines: Guidelines for the Interim Chronic Pain Policy, Board Minute 1, May 2, 1989, p.74

DECISION NO. 348/90I (11/05/90) Onen Drennan Barbeau*Procedure (absent parties).*

The worker was appealing denial of continued full benefits. The worker did not appear at the hearing and Tribunal counsel could not contact him. The Panel decided to adjourn the hearing.

The Panel noted that the record before the Panel was incomplete as it did not include the medical record, other relevant documentation and some Board decisions regarding one of the accidents for which the worker was receiving benefits. The Panel instructed Tribunal counsel to complete the record. [4 pages]

DECISION NO. 915/88 (11/05/90) Strachan Heard Nipshagen*Aggravation (preexisting condition).*

A nurses's aide suffered a neck and upper back sprain in April 1981 when she prevented a patient from falling. The Board granted benefits until August 1981. There was limited medical evidence available since the worker's doctor left the country and her records were unavailable.

The Panel found that the worker aggravated a preexisting degenerative condition in the accident and that the aggravation was permanent. The worker was referred to the Board for a pension assessment. [7 pages]

DECISION NO. 300/90 (11/05/90) Faubert Higson Barbeau*Access to worker file, s. 77.*

Access to the worker's file was granted to the employer. [3 pages]

DECISION NO. 953/89 (11/05/90) McGrath Robillard Nipshagen*Subsequent incidents (outside work) - Aggravation (compensable injury).*

The worker suffered a right shoulder injury in 1978, for which he was awarded a 15% pension. In 1986, the worker tripped and fell in a non-compensable accident, injuring both shoulders. The left shoulder healed in about one week but the right shoulder remained at an increased level of disability.

The Panel found that the worker aggravated his preexisting compensable condition in the non-work-related accident in 1986. The worker was entitled to benefits for the aggravation. [6 pages]

DECISION NO. 355/90 (14/05/90) Kenny Drennan Nipshagen*Access to worker file, s. 77.*

Access to worker's file granted to the employer. [3 pages]

DECISION NO. 353/90 (14/05/90) Kenny Drennan Nipshagen

Access to worker file, s. 77.

Access to the worker file was granted to the employer. [3 pages]

DECISION NO. 352/90 (14/05/90) Kenny Drennan Nipshagen

Access to worker file, s. 77.

Access to the worker's file was granted to the employer. [4 pages]

WCAT Decisions Considered: Decision No. 768 (1987), 4 W.C.A.T.R. 283; Decision No. 46/89

DECISION NO. 354/90 (14/05/90) Kenny Drennan Nipshagen

Access to worker file, s. 77.

Access to the worker's file was granted to the employer. [4 pages]

DECISION NO. 329/90 (14/05/90) Signoroni Robillard Preston

Accident (occurrence).

On the evidence, the worker suffered a compensable wrist injury. The worker reported the accident to his foreman immediately. He contacted his doctor the same day and saw him the next day. Although there were no visible signs of injury, the worker's doctor did not hesitate to find that it disabled him from his regular work. [4 pages]

DECISION NO. 253/90 (14/05/90) Moore Lebert Meslin

Temporary partial disability.

The worker suffered a low back injury in November 1986. Benefits were terminated in December 1987 when the Board decided that the worker had recovered and was fit to return to regular work.

The Panel found that the worker was temporarily partially disabled subsequent to December 1987. The preponderance of medical evidence recommended that the worker avoid repetitive lifting and bending. [6 pages]

DECISION NO. 273/90 (14/05/90) Bigras Cook Howes

Subsequent incidents (outside work).

The worker suffered a compensable low back injury in 1985 for which he was awarded a 10% pension. In 1988, he suffered pain in his low back at home while lifting a tire out of a car. The worker claimed that,

if not for his preexisting compensable condition, he would not have suffered the re-occurrence while lifting the tire.

The worker was not entitled to benefits in 1988. The worker had been able to return to his regular employment after the 1985 accident and his condition had stabilized. The non-compensable accident in 1988 was the significant factor which caused the aggravation of the preexisting back condition. [6 pages]

DECISION NO. 75/90 (14/05/90) Hartman Jackson Meslin
Battaglia v. Partington

Section 15 application - In the course of employment (assault).

The parties were both workers of the same employer. Banter and chiding were common in the workplace. After the defendant damaged a coil, the plaintiff wrote graffiti on the coil regarding the defendant's work. The defendant assaulted the plaintiff.

The plaintiff and the defendant were in course of employment. The graffiti dealt specifically with a work-related activity. The graffiti was a written form of the banter and chiding that occurred regularly.

The plaintiff's right of action was taken away. [9 pages]

WCAT Decisions Considered: Decision No. 337 (1986), 2 W.C.A.T.R. 141; Decision No. 516/87 (1987), 5 W.C.A.T.R. 168; Decision Nos. 714, 879/87

DECISION NO. 224/90 (14/05/90) Starkman McCombie Howes

Heart attack - Presumptions (section 3) (standard of proof) - Accident (definition of).

The worker appealed a decision of the Hearings Officer denying entitlement for a heart attack. The worker was a 63 year old porter in pharmacy. She experienced chest pain lifting some boxes. She was diagnosed as having suffered a subendocardial myocardial infarction. The worker was a diabetic, a moderately heavy smoker and there was a family history of heart disease.

The Panel found that the worker's heart attack was an accident in the general sense suggested by Decision No. 42/89. Since the accident occurred in the course of employment, the presumption clause in s.3(3) was applicable.

In Decision No. 24F, the standard for rebutting the presumption was beyond a reasonable doubt. The Panel found that this standard was not correct and was not in the best interest of the workers' compensation adjudication. Further, in Decision No. 24F, the theories of employment relatedness and non-employment relatedness were examined and compared, after which all reasonable theories of employment relatedness were ruled out. The Panel found that the Act does not require a finding of a significant theory of employment relatedness. Rather, if the accident occurred in the course of employment, the Act presumes that it arose out of employment unless the contrary is shown.

The Panel concluded that the standard of proof for rebutting the presumption is whether it is shown by clear and convincing evidence that the accident did not arise out of employment. This formulation is intended to indicate a standard somewhat higher than the balance of probabilities but not at the level of beyond a reasonable doubt.

In this case, considering the medical evidence and the temporal link, there was not clear and convincing evidence to rebut the presumption. It was possible or even probable that work was not a factor but it was also possible that work was a significant factor in the onset of the heart attack. The appeal was allowed. [14 pages]

WCAT Decisions Considered: Decision No. 72 (1986), 2 W.C.A.T.R. 28; Decision No. 918 (1988), 9 W.C.A.T.R. 48; Decision No. 1018/87 (1989), 10 W.C.A.T.R. 82; Decision No. 42/89 (1989), 12 W.C.A.T.R. 85; Decision Nos. 24F, 980/89

DECISION NO. 213/90 (15/05/90) Moore Lebert Seguin

Access to worker file, s. 77 - Procedure (absent parties).

The worker was absent for the hearing of his s.77 appeal. The Panel proceeded in his absence. Access to the worker's file was granted to the employer. [5 pages]

**DECISION NO. 8/90 (15/05/90) Moore McCombie Jago
Smith v. MacDonald**

Section 15 application - Supplier of motor vehicle, machinery or equipment - Jurisdiction, Tribunal (section 15) (dependants).

The plaintiff and defendant driver were both workers in the course of employment at the time of a motor vehicle accident.

The plaintiff's right of action against the defendant driver was taken away. The right of action against the leasing company which owned the vehicle driven by the defendant was not taken away. The Tribunal did not have jurisdiction regarding the claims of the plaintiff's family members. [9 pages]

WCAT Decisions Considered: Decision No. 337 (1986), 2 W.C.A.T.R. 141; Decision No. 725 (1987), 4 W.C.A.T.R. 266; Decision No. 432/88 (1988), 9 W.C.A.T.R. 306; Decision Nos. 571/88, 1226/88, 253/89
Cases Considered: Meyer and McDermott v. WCB (Ont.C.A., March 25, 1988, unreported)

DECISION NO. 210/90 (15/05/90) Onen Klym Nipshagen

Medical examination (section 21).

The employer's application for an order requiring the worker to attend a medical examination was denied. There was a valid compensation goal regarding entitlement. However, most of the employer's objections to the claim were based on credibility. The examination would not assist in this regard. Further, there were medical reports on file regarding some of the employer's other concerns, such as preexisting condition. The worker had been examined thoroughly by a rheumatologist. An examination by an orthopaedic specialist was not required. [5 pages]

DECISION NO. 240/90 (15/05/90) Moore Drennan Clarke

Subsequent incidents (outside work).

The worker suffered an ankle injury in 1974 for which he was awarded an 8% pension. The treating orthopaedic surgeon indicated that the worker would be susceptible to recurring strains. He recommended that the worker wear a brace. He also indicated that the worker could participate in sports activities. In 1988,

the worker suffered a further injury when his ankle gave out while he was playing baseball.

The worker was entitled to benefits for the accident in 1988. The worker was prone to recurrences. Considering the medical evidence, the Panel found that the ongoing permanent condition was a significant contributing factor to the injury in 1988. [7 pages]

WCAT Decisions Considered: 691, 381/89

DECISION NO. 250/90 (15/05/90) Starkman Beattie Preston

Supplements, temporary - Worker (long term service) - Chronic pain.

The worker suffered a right knee injury for which he was awarded a 10% pension. The worker was entitled to a temporary supplement from April 1984 to October 1985, considering his age, education and long term service with the employer. Although the Board's policy on long term service employees applies to temporary benefits only, the Panel was satisfied that the considerations that went into the promulgation of the policy for temporary benefits were equally applicable to the temporary supplement situation.

The worker was not entitled to benefits for chronic pain. The pain was attributable directly to the knee disability. [7 pages]

Practice Directions Considered: Practice Direction No. 9 (1987), 7 W.C.A.T.R. 444

Board Directives and Guidelines: Claims Adjudication Branch Procedures Manual, Document no. 33-20-02; Claims Services Division Manual, s.40(2)(b) p.105, Directive 1

DECISION NO. 317/90 (15/05/90) Starkman Jackson Preston

Temporary total disability.

A punch press operator suffered a crushing injury to her hand in March 1984, resulting in amputation of several fingers. She received temporary total disability benefits until December 1985 and full temporary partial disability benefits until June 1986. From June to August 1986, the worker was in Italy and received 50% benefits.

The Panel found that the worker was totally disabled during the period she was in Italy. Since the Board does not usually provide vocational rehabilitation assistance to totally disabled workers, it is generally to the benefit of workers to be considered partially disabled. The worker suffered a serious traumatic accident and had not come to terms with her disability. Although the worker had been making efforts to cooperate with vocational rehabilitation, she was nevertheless totally disabled. [8 pages]

DECISION NO. 218/90 (15/05/90) Moore Klym Jago

Fibromyalgia - Board Directives and Guidelines (fibromyalgia).

The worker suffered a shoulder injury in September 1984. Three months later, fibromyalgia was diagnosed. The Board discontinued benefits in January 1985.

The Panel found that the worker was suffering from fibromyalgia and that the compensable accident in September 1984 made a significant contribution to the disability. In this case, the worker's condition had not changed significantly since it was diagnosed. The worker was entitled to a pension retroactive to December 1985.

The Panel noted Board policies regarding fibromyalgia, which provide for entitlement from November 1986 in accordance with the Board policy for psychotraumatic disability and for entitlement after July 1987 either under the chronic pain policy or the psychotraumatic disability policy. Since the Panel's decision involved further action on part of the Board and the worker, the matter was referred back to the Board. [9 pages]

WCAT Decisions Considered: Decision No. 18 (1987), 4 W.C.A.T.R. 21; Decision No. 915A (1988), 7 W.C.A.T.R. 269; Decision No. 669/87F (1989), 11 W.C.A.T.R. 54
Board Directives and Guidelines: Operational Policy Manual, Document no. 03-03-07

DECISION NO. 912/89 (16/05/90) Signoroni Fox Jago

Adjournment (addition or representative) - Continuity (of symptoms).

During cross-questioning of the worker, it became apparent to the Panel that the unrepresented employer was unable, from an advocacy perspective, to fairly present its case. An adjournment was granted.

The worker suffered a low back strain in 1972 and received benefits for about six weeks. The worker was not entitled to benefits in 1981. He was able to do heavy physical labour after the accident. On the evidence, the Panel found that the 1972 accident was minor and that the worker had recovered by the time benefits were terminated. [8 pages]

DECISION NO. 859/89I (16/05/90) Carlan Fox Seguin

Exposure (dust) - Exposure (ammonium nitrate) - Investigation by Tribunal - Mining - Construction (air track driller) - Chronic obstructive lung disease.

The worker appealed a decision of the Appeals Adjudicator denying entitlement for chronic obstructive lung disease (COLD). The worker was an underground gold and uranium miner as well an air track driller for a construction company. The worker claimed that his respiratory condition resulted from exposure to dust and from exposure to ammonium nitrate, an ingredient in explosives used in both the mining and construction work.

Tribunal counsel was instructed to arrange for a s.86h assessor to attend a reconvening of the hearing to provide more information about COLD as well as an opinion on etiology of the worker's illness. In addition, the Board and the Ontario Mining Association (representative for the rate group of the inactive mining companies for which the worker had been employed) were invited to make submissions regarding the Board policy on COLD.

Board Directives and Guidelines: Claims Adjudication Branch Procedures Manual, Document No. 33-13-18

DECISION NO. 262/90 (16/05/90) Bradbury Klym Apsey

Stress.

The worker started working for the employer in 1979. In 1982, he was laid off. The worker claimed that the lay-off put him in a situation where he has been unemployed or under-employed since and that the employer's contribution to his state of unemployment has resulted in a stress condition.

The Panel found that the worker did not have a stress-related disability. He was not disabled from working prior to the lay-off, he found some temporary positions after the lay-off and there was no evidence that he was currently disabled from working. Further, he did not see a doctor until 1988.

Even if the worker was suffering from a stress-related disability, there was no evidence that it was work-related. A performance appraisal in 1982 was conducted in a straightforward manner. Twelve other employees were laid off at the same time as the worker during the recession and this worker was not treated differently than the others. [5 pages]

WCAT Decisions Considered: 980/89

DECISION NO. 185/90 (17/05/90) Carlan McCombie Clarke

Maximum medical rehabilitation - Temporary disability (beyond pension level).

The worker suffered a low back injury for which she was awarded a 30% pension for organic disability and a 10% pension for psychiatric disability.

The Panel found that the worker was not entitled to continuing temporary benefits subsequent to February 1985. Temporary benefits were terminated after an assessment at COSTI which supported the conclusion that the worker had achieved maximum medical recovery.

The worker was not entitled to temporary benefits for periods in which she required chiropractic treatment. These periods of treatment did not establish a significant change in her condition or disability. [5 pages]

DECISION NO. 820/89 (17/05/90) Bigras Rao Preston

Continuity (of symptoms) - Evidence (corroboration) - Osteoarthritis (toe).

A teacher stubbed his toe on an electrical outlet in 1967 but lost no time from work. In 1984, the worker asked for benefits.

The worker claimed that a co-worker could give information regarding his complaint. The employer would not release the co-worker's address and the Board did not follow up by sending a letter to the employer to be forwarded to the co-worker. The Board appeared to find that the worker lacked supportive evidence of continuity of complaint. The Panel found that the Board placed an unfair requirement of supportive evidence on the worker. The worker's evidence was uncontradicted and it was the employer that refused to provide the information.

There was supportive medical evidence relating the injury to osteoarthritis of the worker's toe. The worker was entitled to a pension retroactive to the date the condition was diagnosed in 1984. [7 pages]

WCAT Decisions Considered: Decision No. 915 (1987), 7 W.C.A.T.R. 1

Board Directives and Guidelines: Claims Adjudication Branch Procedures Manual, Document no. 33-20-01

DECISION NO. 645/89 (17/05/90) Bigras Robillard Seguin

Pensions (assessment) (back).

The worker suffered a low back injury in 1977 when he fell from a ladder, for which he was awarded a 15% pension, later increased to 20%.

The worker was not entitled to an increase in the pension. A new pension assessment found that the pension level was appropriate.

The evidence indicated that the worker was totally disabled by a combination of the back disability and a hip disability. The Panel did not have jurisdiction regarding the hip disability but recommended that the worker pursue entitlement for the hip condition at the Board. [15 pages]

WCAT Decisions Considered: Decision No. 915 (1987), 7 W.C.A.T.R. 1; Decision No. 645/89I

DECISION NO. 983/89I (18/05/90) Kenny Robillard Jago

Adjournment (for judicial review).

The parties requested an adjournment pending the hearing of an application for judicial review of a Tribunal decision dealing with the applicability of the Act to the employer.

Regardless of the jurisdictional arguments raised by the employer, s. 21 contains certain requirements which must be met before there is a proper application before the Tribunal. A preliminary look at the file caused the Panel to seriously question whether these requirements had been met in this instance. If they were not met, the s. 21 application could be dismissed and there would be no need to adjourn the case pending the judicial review. This issue could thus be addressed without prejudice to the employer's position that the Act did not apply to its employees.

On hearing the arguments and evidence as to whether the s. 21 requirements had been met, the Panel decided that the applicant had made out a sufficiently strong case that a final decision on this preliminary issue should not be made until there was a hearing on the merits of the s. 21 application. The hearing was adjourned. [3 pages]

DECISION NO. 81/90 (18/05/90) Marafioti Cook Seguin

Subsequent incidents (outside work).

The worker's preexisting degenerative disc condition was rendered symptomatic by a compensable accident in January 1985. In July 1986, while lifting a 10 to 15 pound product purchased for use at home, the worker experienced severe back pain which he claimed was similar in nature and location to that suffered due to the January 1985 accident. On the evidence, the worker's organic back condition had resolved by October 1985. Any organic back disability subsequent to July 1986 did not result from the January 1985 accident. The worker was not entitled to further benefits. [6 pages]

Board Directives and Guidelines: Claims Adjudication Branch Procedures Manual, Document no. 33-02-20

DECISION NO. 307/89I (23/05/90) Carlan Acheson Meslin

Exposure (coke oven emissions) - Exposure (welding fumes) - Welding - Cancer (lung) - Investigation by Tribunal.

The worker's widow appealed a decision of the Hearings Officer denying benefits for the worker's death from lung cancer. The worker was a welder. Over a period of 20 years, he had 6 years of exposure to coke oven emissions. He was also exposed to welding fumes, including some exposure to chromium while welding stainless steel.

The Panel instructed Tribunal counsel to obtain further information from a s.86h assessor regarding lung cancer and the type of toxins to which this worker was exposed. [13 pages]

DECISION NO. 195/90 (23/05/90) Moore Klym Preston

Hearing loss - Tinnitus - Otosclerosis - Board Directives and Guidelines (hearing loss) (individual susceptibility).

A welder appealed denial of entitlement for hearing loss and tinnitus. Hearing loss was diagnosed in 1971. He had non-compensable low tone hearing loss caused by otosclerosis and bilateral high tone sensorineural hearing loss. He underwent surgery in 1972 and 1974 for the otosclerosis.

On the evidence, the Panel found that the worker was exposed to hazardous levels of noise. The sensorineural hearing loss was bilateral. There was no significant change in hearing loss after the stapedectomies in 1972 and 1974 and the Panel found that these surgical procedures did not contribute in any significant way to the high frequency hearing loss. The significant contributing factor was workplace noise.

Although the worker developed the hearing loss after only two years of exposure with the employer, he was susceptible to hearing loss because of previous noise exposure with a different employer between 1964 and 1966, preexisting otosclerosis and individual susceptibility due to undetermined factors.

The Panel recommended that the employer apply for SIEF relief. The Panel also noted that the Board had a policy for determining the level of disability where there is a preexisting condition. The appeal was allowed. The matter was referred to the Board for determination of benefits. [13 pages]

DECISION NO. 169/90 (23/05/90) Moore Klym Preston

Second Injury and Enhancement Fund (psychological condition) - Transfer of costs - Administrative Fund (transfer of costs) - Standing.

The worker suffered a low back injury in April 1976. She received temporary benefits until February 1982 and was awarded a 15% pension. The worker appealed a decision of the Hearings Officer granting 50% SIEF relief to the employer for aggravation by non-compensable psychological factors.

In a preliminary matter, the Panel found that the worker had standing to bring this appeal. If the Panel upheld the Hearings Officer decision, the worker intended to seek entitlement for psychiatric disability. She had a material interest in the Board's conclusions.

The worker underwent surgery in 1981, after which her symptoms decreased substantially. There was indication in some medical reports that the surgery was unnecessary that it was effective only as a placebo and that the worker had preexisting psychological problems. On the evidence, the Panel found that the surgery was justified on an organic basis. If the worker had a preexisting psychological condition, it did not aggravate or prolong the disability. Her condition was organic in origin. Misdiagnosis led to delay in the surgery until 1981. The employer was not entitled to SIEF relief.

The misdiagnosis was based on the existence of medical reports noting a psychogenic problem. These opinions originated at HRC in the fall of 1976. This was an appropriate case to transfer to the Administrative Fund 50% of the costs of the temporary benefits from December 1976 to February 1982. Relief of costs associated with the pension was referred to the Board. [14 pages]

WCAT Decisions Considered: Decision No. 915 (1987), 7 W.C.A.T.R. 1; Decision No. 431/89 (1989), 11 W.C.A.T.R. 355; Decision No. 108/87

Board Directives and Guidelines: Claims Adjudication Branch Procedures Manual, Document no. 33-02-34; Document no. 33-28-01; Claims Services Division Manual, s.108(2), p.235, Directive 1

DECISION NO. 656/89 (24/05/90) Kenny Beattie Nipshagen

Chronic pain - Pensions (assessment) (back) - Temporary disability (beyond pension level).

The worker suffered low back injuries in 1968 and 1970, for which he was awarded a 30% pension for organic disability and a 15% pension for psychological disability. In November 1984, the worker aggravated his condition and received temporary total disability benefits until December 1984 and 50% temporary partial disability benefits until January 1986.

On the evidence, the acute period of aggravation ended by December 1984. The worker was not entitled to temporary benefits from December 1984 to January 1986. Any resulting overpayment should not be collected.

The worker was not entitled to an increase in his pension nor was he entitled to a pension for chronic pain. The 45% award recognized the extent of the worker's permanent disability resulting from both organic and non-organic sources. [13 pages]

WCAT Decisions Considered: Decision No. 519 (1987), 6 W.C.A.T.R. 50; Decision No. 915 (1987), 7 W.C.A.T.R. 1; Decision No. 339

Board Directives and Guidelines: Claims Services Division Manual, s.71(3), p.209, Directive 23; Chronic Pain Disorder Policy, Board Minute 2, July 3, 1987, p. 5196

DECISION NO. 107/90 (24/05/90) Hartman Fox Nipshagen

Accident (occurrence) - Delay (reporting injury).

A labourer and cement contractor was not entitled to benefits for a left shoulder condition. Considering delays in reporting and inconsistencies in the worker's evidence, the Panel found that the injury did not result from strenuous work. [7 pages]

DECISION NO. 139R (24/05/90) Strachan Fox Jago

Reconsideration (new evidence).

The worker's application to reconsider Decision No. 139 was denied. New reports submitted by the worker did not address the causal relationship between the compensable accident and the current problems. [4 pages]

WCAT Decisions Considered: Decision No. 95R (1989), 11 W.C.A.T.R. 1; Decision Nos. 72R, 72R2, 139

DECISION NO. 469/89 (24/05/90) Bigras Heard Jago

Continuity (of treatment).

The worker suffered a back injury when he fell in December 1977. He received benefits until February 1978. The worker was not entitled to benefits for a back condition in 1982, considering lack of continuity of treatment from 1978 to 1982 and considering the preponderance of medical opinion, which was not supportive. [11 pages]

WCAT Decisions Considered: 91/89

DECISION NO. 209/90 (24/05/90) Onen Klym Nipshagen*Medical examination (section 21).*

The employer applied for an order requiring the worker to attend a medical examination. The employer had written to the doctor it selected, commenting on the contents of the Board file and stating the importance to the employer of SIEF relief. The report which would be received from the doctor would likely be coloured by the commentary in the letter. As a result, the report would not carry any significant weight. The application was denied. [6 pages]

WCAT Decisions Considered: Decision No. 174 (1986), 2 W.C.A.T.R. 96

DECISION NO. 105/90 (24/05/90) Onen Robillard Meslin*Medical examination (section 21) - Time limits (section 21) - Charter of Rights (due process).*

The employer applied for an order requiring the worker to attend a medical examination.

In a preliminary matter, the Panel found that the employer complied with the time limit in s.21. The worker objected to the examination in a letter to the Board in August but the employer had no actual or constructive notice of the objection until November. The employer brought the application within the time limit after becoming aware of the objection.

The worker submitted that the Tribunal should deny the application since the employer did not notify the worker of her right to refuse the examination. There was no express requirement in the section for such notice. The Panel would not imply such a procedural requirement into the section.

A further issue was raised whether the absence of such an implied provision contravened s.7 of the Canadian Charter of Rights and Freedoms. The Panel was satisfied that workers who have objections are able to find out about their rights under the Act. In any event, the worker in this case found out about her right to object and exercised that right.

A medical examination by a psychiatrist was important to achieving a valid compensation goal. The worker submitted that the examination be conducted by her own treating psychiatrist. Section 21 allows the employer to request an examination by a practitioner of its choice. While the Tribunal has discretion to make such other order as may be just, considerations of privacy did not outweigh the importance of allowing the employer to choose its own practitioner in this case. The application was granted. [8 pages]

WCAT Decisions Considered: Decision No. 434 (1987), 4 W.C.A.T.R. 183

Other Statutes Considered: Canadian Charter of Rights and Freedoms, s.7

DECISION NO. 342/90 (24/05/90) Kenny Lebert Ronson*Injury by accident - Jurisdiction, Tribunal (leave to appeal).*

The worker appealed a decision of the Review Board in 1954 denying entitlement for a back condition.

In a preliminary matter, the Panel found that leave to appeal was not required from a decision of the Review Board and that the Tribunal had jurisdiction to hear the appeal.

The worker experienced a sudden onset of back pain while throwing some cable. This was a regular part of his job. Although there was no disablement provision in the definition of accident in 1954, the Panel

agreed with Decision No. 42/89 that at least prior to 1963, sudden and unexpected injuries without any external chance event were included with the meaning of the word accident. The appeal was allowed. [8 pages]

WCAT Decisions Considered: Decision No. 42/89 (1989), 12 W.C.A.T.R. 85; Decision No. 408/87

DECISION NO. 332/90 (24/05/90) Signoroni Robillard Preston

Accident (occurrence).

On the evidence, the Panel found that accident occurred when the worker was assaulted by a customer suspected of shoplifting. The accident aggravated the worker's preexisting condition. [6 pages]

DECISION NO. 1003/89 (24/05/90) McGrath Fox Meslin

Health care (appliances or apparatus) (orthopaedic bed).

The worker suffered a compensable back injury. The Board denied payment for an orthopaedic bed prescribed by the worker's doctor. Board policy provided that non-medical items, such as orthopaedic beds, that were available to the general public and not directly related to treatment, were not considered part of the worker's entitlement. However, the policy did state that each request should be considered on its own merit.

In this case, the bed aided in the worker's rehabilitation. The worker was entitled to be reimbursed for the cost of the bed. [6 pages]

DECISION NO. 319/90 (24/05/90) Bradbury Lebert Seguin

Pensions (lump sum) (10% pension) - Board Directives and Guidelines (commutation) (10% pension).

The worker sought full commutation of his 10% pension for the purpose of a home purchase. He was currently renting a home for \$285 monthly. The owner offered to sell the house to the worker at a favourable price and on reasonable mortgage terms. If the commutation were granted, his mortgage payments would be \$185 monthly. If he did not buy the house and were forced to move elsewhere, his rent would be approximately \$600 monthly.

The facts of this decision fall within s. 45(4) of the Act, rather than s. 26(1). The Board's current commutation policy generally treats the two types of commutation differently. There are certain requirements, however, that appears to be the same for both. The Panel found that these requirements -- relating to rehabilitative purpose, alternative resources, ability to meet financial obligations and counselling -- were inconsistent with s. 45(4). The wording of s. 45(4) should prevail.

As the evidence did not establish that the commutation would not be to the best advantage of the worker, the commutation should be granted. [6 pages]

WCAT Decisions Considered: Decision No. 223/89 (1989), 11 W.C.A.T.R. 302

Board Directives and Guidelines: Commutation of Pensions Policy, Board Minute #4, April 3, 1987, p.5186;
Guidelines for the Commutation of Pensions, Board Minute #3, March 20, 1989, p.71

DECISION NO. 268/90 (24/05/90) Carlan Beattie Preston*Continuing entitlement.*

The worker was not entitled to benefits for any period beyond one week following a motor vehicle accident in August 1977 that involved his truck rolling over.

The first documented evidence of back complaint did not occur until three months after the accident. Despite examination of the worker by several physicians shortly after the accident, no significant organic problem was identified. There was a long period from 1979 to 1982 when no medical attention for a low back problem was sought. It was not until after a car accident in 1982, that the low back problems became more apparent. Though some of the doctors concluded that the worker might have sustained a serious injury in 1977, their support was qualified by the assumption that the worker had provided an accurate history. [7 pages]

DECISION NO. 890/88 (25/05/90) Moore McCombie Meslin*Second accident - Recurrences (compensable injury).*

The worker suffered a back injury in July 1965, for which he received benefits until April 1966. On the evidence, a further back disability in 1974 was not a recurrence of the 1965 injury but, rather, a new injury by accident resulting from work in 1974. Accordingly, the worker's benefits should be calculated on the basis of his earnings prior to the 1974 accident. [6 pages]

WCAT Decisions Considered: 890/88L

DECISION NO. 759/88 (25/05/90) Strachan Robillard Meslin

Tepes v. Ioakimidis

Section 15 application - In the course of employment (personal activity).

A school bus driver had finished her morning trip. She went to buy some groceries and was proceeding in the school bus to her home when she was involved in a motor vehicle accident. She made three trips per day and kept the bus at her home between trips. Her employer allowed her to use the bus for personal use.

The Panel found that the predominant character of the activity at the time of the accident was personal. The worker was not in the course of employment. Her right of action was not taken away. [10 pages]

Cases Considered: Nancollas v. Insurance Officer, [1985] 1 All E.R. 833

DECISION NO. 324/90 (25/05/90) Kenny Klym Nipshagen

Supplements, temporary (wage loss) - Supplements, older worker - Availability for employment (job search) - Board Directives and Guidelines (temporary supplements) (policy change) - Health care (chiropractic).

The worker worked with her husband on a farm, where she performed physical and managerial duties. In April 1981, she suffered a compensable injury. In 1986, she returned to work on the farm but was unable to

perform the physical work. The worker claimed that she should be entitled to a supplement from January 1987, when a pension award was made permanent.

The worker was not disentitled due to failure to conduct a job search. She was working part time at her pre-accident job. She was 51 years old with a grade 8 education and had been working on the family farm for 26 years. She was limited by her disability in the number of other jobs she could perform.

Pursuant to Board policy in effect in January 1987, the worker was eligible for a wage loss supplement for 12 months. However, pursuant to new policy in November 1987 and an addendum in December 1987, the wage loss supplement probably would not have been extended beyond six months. Therefore, the worker was entitled to a temporary supplement from January 1987 to June 1988.

The worker was not entitled to an older worker supplement since she returned to work within the meaning of s.45(7).

The worker was entitled to reimbursement for chiropractic treatments since the treatments reduced her pain and allowed her to function better and continue working after she experienced aggravation of pain. [10 pages]

WCAT Decisions Considered: Decision No. 915 (1987), 7 W.C.A.T.R. 1; Decision No. 4/89 (1989), 11 W.C.A.T.R. 226; Decision No. 466/89 (1989), 11 W.C.A.T.R. 369; Decision No. 998/89

Board Directives and Guidelines: Claims Adjudication Branch Procedures Manual, Document no. 33-20-02; Policy of Supplementary Benefits under s.45(5) of the Act, Board Minute 1a, November 16, 1987, p.52; Addendum to the s.45(5) Policy, December 3, 1987

DECISION NO. 324/89 (25/05/90) Carlan Heard Apsey

Pensions (assessment) (back) - Rehabilitation, vocational (cooperation).

The Panel confirmed the worker's pension for low back problems at the 20% level. The worker's pain prevented him from achieving complete mobility of the spine. There were some indications of neurological problems caused by his accident, but they were not severe. Physical findings of the worker's doctors should be at least equal value to the findings of the doctors employed by the Board. However, such findings are not in themselves determinative as to the degree of the disability. They have to be compared to the benchmarks in the rating schedule.

The Panel found that the worker was entitled to neither full temporary benefits for a period during which he received 50% temporary benefits, nor to supplementary pension benefits for a subsequent period. Given the worker's limited activity, his previous history of a poor work attitude, and his statements to Board doctors claiming total disability, the Panel found that he was not actively engaged in searching for work. [11 pages]

DECISION NO. 693/89 (28/05/90) Moore Cook Seguin

Pensions (assessment) (back).

The worker suffered a back injury for which she was awarded a 15% pension. On the evidence, the Panel found that the worker suffered a degree of impairment two-thirds that of a worker with a totally immobilized back. Comparing that to the Rating Schedule, the Panel awarded a 20% pension. [7 pages]

DECISION NO. 924/89 (28/05/90) Chapnik Lebert Seguin*Earnings basis (recurrences) - Second accident.*

In 1979, the worker suffered a low back injury when he was thrown about 25 feet in the air and landed flat on his back. In 1986, the worker was climbing logs in cold, icy weather when he had to brace himself on the logs to prevent himself from slipping. He felt severe pain in his back. The worker appealed a decision of the Hearings Officer calculating benefits for the 1986 accident on the basis of earnings prior to the 1986 accident.

To calculate benefits under s.43(7) on the basis of the earlier accident, the second accident must result from the first one. There must be more than some continuity of complaint or treatment. The first accident must be a significant contributing factor to the occurrence of the second accident or it must contribute significantly to the severity or duration of the injury resulting from the second accident.

The Panel found that the 1986 accident constituted a new accident which did not arise out of the original 1979 accident. The 1986 accident was not minor in nature. It occurred not because of the worker's weakened condition but, rather, because of the hazardous nature of the job and the weather conditions. The appeal was dismissed. [11 pages]

WCAT Decisions Considered: Decision No. 363 (1987), 6 W.C.A.T.R. 42; Decision No. 216

DECISION NO. 876/89 (28/05/90) Faubert Jackson Nipshagen*Medical examination (section 21).*

The worker was required to attend a medical examination. There were questions concerning a concurrent disability, prolonged nature of the disability, current findings and existence of a preexisting condition which had not been addressed by the doctors who had examined the worker. [5 pages]

WCAT Decisions Considered: Decision No. 174 (1986), 2 W.C.A.T.R. 96

DECISION NO. 26/88 (28/05/90) Strachan Ferrari Preston*Continuing entitlement.*

The worker suffered an inguinal hernia in August 1980 and received benefits until December 1981. He suffered a back injury in February 1982 and received benefits until January 1983.

The worker was not entitled to benefits for a back condition in 1984. On the evidence, the 1982 accident aggravated preexisting degenerative disc disease. The worker's condition returned to its pre-accident state by January 1983. His condition in 1984 was related to the degenerative condition.

The worker underwent surgery for his hernia in November 1983. Pursuant to Board policy, he should have received benefits for the two week period prior to the surgery. However, the worker was not disabled by the hernia from January 1983 to November 1983. [10 pages]

DECISION NO. 637/88 (28/05/90) Strachan Cook Jago
Richardson Graphics Canada Ltd. v. Critchell

Section 15 application.

The plaintiff's right of action for an accident occurring in the course of employment was taken away.
[5 pages]

DECISION NO. 467/89 (28/05/90) Onen Higson Seguin

Interest - Jurisdiction, Board (interest) - Jurisdiction, Tribunal (interest) - Retroactivity - Overruling - Medical report (payment for) - Parties (representation).

The worker suffered an injury for which he was awarded benefits until February 1986. On appeal, the Hearings Officer granted benefits subsequent to February 1986 but denied interest on benefits awarded retroactively.

The Panel agreed with Decision No. 915A that a tribunal or board which administers and adjudicates must consider the question of retroactivity when a change in the interpretation of the law occurs. In making a determination respecting retroactivity, the obligation of the administrative agency is to set limits on the basis of the requirements for good public administration.

The Panel agreed with Decision No. 206A that the Board and the Tribunal have jurisdiction by necessary implication to pay interest on delayed payment of benefits. Recent developments in law militate against a narrow construction of the Act to exclude any implied authority to pay interest. This finding was in the nature of an overruling.

The Panel adopted a one-date-for-all approach to limiting retroactivity in the payment of interest. A retroactivity date should truly reflect a critical point when the administrative agency knew, or ought to have known, that a new interpretation should be instituted in the interest of good public administration. The Panel could not set a categorical date for all interest cases. However, in this case, the Panel selected April 14, 1987, as the critical date. This is the date of the hearing in Decision No. 206A. At this point, full submissions regarding interest were heard by the Tribunal and were available to the Board. The Board was in position to know the competing arguments and the new developments in law which resulted in an interpretation of the Act which allows the payment of interest.

The worker was entitled to interest from April 14, 1987, on all amounts owing after that date, not simply on those which accumulated after that date.

Another issue was payment for medical reports submitted by the worker to the Hearings Officer. The Hearings Officer granted payment up to the amount allowed for an expert witness. The Hearings Officer granted \$150 for one report from one of the worker's doctor. The Panel found that the Hearings Officer relied on several reports of that doctor and, therefore, allowed \$275, which was the amount allowable for an expert witness.

The Panel noted with concern that the worker's lawyer withdrew from the case after agreeing to a hearing date and shortly before the hearing, due to complexity and costs of the case, putting the worker into a difficult position. The hearing had to be adjourned in any event due to illness of the employer's representative. [26 pages]

WCAT Decisions Considered: Decision No. 206A (1988), 9 W.C.A.T.R. 4; Decision No. 915 (1987), 7 W.C.A.T.R. 1; Decision No. 915A (1988), 7 W.C.A.T.R. 269; Decision No. 206
Board Directives and Guidelines: Interest Policy, Board Minute 10, January 6, 1989, p.5276; Retroactive Policy, Board Minute 6, October 2, 1987, p.5208
Cases Considered: R. v. Hertfordshire County Council, The Times, April 4, 1986

DECISION NO. 406/89 (29/05/90) McIntosh-Janis McCombie Apsey

Pensions (assessment) (back) - Pensions (assessment) (neck).

The worker suffered compensable injuries for which he was awarded a 25% pension for low back disability and a 20% pension for cervical disability. In Decision No. 406/89I, the Panel requested a new pension assessment from a Board pension assessor. That assessment confirmed the original assessments. The worker had no further submissions regarding the assessment. The worker's appeal was dismissed. [5 pages]

WCAT Decisions Considered: Decision No. 915 (1987), 7 W.C.A.T.R. 1; Decision No. 406/89I

DECISION NO. 17/90 (29/05/90) Hartman Robillard Apsey

Continuity (of treatment).

The worker suffered a low back injury in September 1981, for which he lost no time. The worker was not entitled to benefits in 1985 considering the minor nature of the injury and lack of continuity of treatment. The condition in 1985 was likely related to ageing or other non-compensable accidents. [7 pages]

DECISION NO. 713/88 (29/05/90) Strachan Robillard Preston

Temporary disability (beyond pension level).

The worker suffered an arm injury in 1978 for which he was awarded a 5% pension. On the evidence, the worker was disabled beyond his pension level from November 1984 to April 1985 and was entitled to temporary total disability benefits. [6 pages]

DECISION NO. 706/89 (30/05/90) Carlan Beattie Apsey

Pensions (assessment) (varicocele) - Varicocele.

While moving a steel plate, the worker suffered a compensable accident. He complained of constant groin and testicular pain since the accident. The worker sought an increase in his 10% pension on the basis that the rating only reflected his low back condition, but not his groin condition.

The worker undoubtedly suffered from varicocele (a varicose condition of the veins of the spermatic chord forming a swelling in the scrotum and accompanied by constant pain in the scrotum) and the existence of this condition may well have been brought to the worker's attention by the strain of the accident. This condition is generally annoying, but not disabling.

The doctor who assessed the worker's pension took into account both the low back and testicular pain experienced by the worker. The only component of the worker's varicocele disability was pain. The limitations referable to the testicular pain mirrored the limitations imposed on the low back pain. Given the similarities in the two problems and in their limitations, there was no basis for entitlement in addition to that received for the low back pain. Since the worker's symptoms were in keeping with those of someone with a minor back condition, he was being fairly compensated by the combined pension award of 10%. [5 pages]

DECISION NO. 942/89 (01/06/90) McGrath Robillard Seguin

Subsequent incidents (outside work) - Aggravation (preexisting condition) (tear) (meniscus) - Tear (meniscus).

The worker suffered a knee injury in September 1983 and received benefits until November 1983. The worker was not entitled to benefits for an incident at home in August 1984. The worker had a horizontal tear of the meniscus. The Panel found that this condition resulted from degenerative changes and that it preexisted the 1983 accident. The 1983 accident was compensable as an aggravation of the preexisting condition. However, the 1983 accident was not a significant contributing factor to the 1984 accident at home. [8 pages]

WCAT Decisions Considered: Decision No. 915 (1987), 7 W.C.A.T.R. 1; Decision No. 1159/87

DECISION NO. 896/88L (01/06/90) McGrath Beattie Preston

Leave to appeal (good reason to doubt correctness) (evidence to support Appeal Board conclusion).

The Appeal Board found that an accident on an access road on the employer's premises did not arise out of and in the course of employment. There was evidence to support the Appeal Board conclusion that the condition of the road was not hazardous. Leave to appeal was denied. [7 pages]

Board Directives and Guidelines: Claims Services Division Manual, s.3(1), p.47, Directive 21

DECISION NO. 1041/89 (01/06/90) Chapnik McCombie (dissenting) Preston

Psychotraumatic disability - Pensions (assessment) (psychiatric disability) - Medical report (payment for) - Procedure (witness fees).

The worker suffered a back injury in 1976 for which he was awarded a 10% pension for organic disability and a 25% pension for non-organic disability. The worker was depressed most of the time and was subject to extreme bouts of anger and violence. He had attempted suicide a number of times. He was unable to care for himself without assistance.

The majority of the Panel found that the worker's pension for non-organic disability should be increased to 40%. The worker's behaviour pattern did not fit squarely into Category 3 of the Board guidelines for major impairment of the total person. However, the categories were only benchmarks or guidelines in making an assessment.

There were other factors contributing to the worker's condition, including non-compensable psychological and domestic problems, his wife's physical condition, a newborn child and a motor vehicle accident. However, the compensable accident was also a significant contributing factor. Even if the worker's condition were to be categorized in a high category, the non-compensable factors were responsible for at least part of the condition.

Payment for two medical reports was denied since they were similar to other reports and since they were not important to the rendering of the decision. Reimbursement for a doctor's attendance was granted in accordance with the Tribunal's fee schedule for expert witnesses since the doctor's presence allowed the Panel to more fully understand the level of the worker's impairment.

The Worker Member, dissenting, noted that the worker's compensation system compensated the disability

and that the Rating Schedule purports to indicate the impairment of earning capacity for the average unskilled labourer of a given disability. There was no objective way to estimate the impairment of earning capacity for a subjective psychiatric disability based on the nature and degree of the injury since the nature and degree of the injury will vary so much. A much more subjective evaluation was required. Considering the Board guidelines, the AMA Guides and the California Guidelines, as well as Tribunal decisions, the Worker Member found the impairment of earning capacity to be in the upper range of the various guides. [28 pages]

WCAT Decisions Considered: Decision No. 915 (1987), 7 W.C.A.T.R. 1; Decision No. 778/87 (1987), 5 W.C.A.T.R. 202; Decision Nos. 126, 58/87, 549/87, 678/87, 756/88
Board Directives and Guidelines: Claims Adjudication Branch Procedures Manual, Document no. 33-21-01; Operational Policy Manual, Document nos. 03-03-03, 03-03-04

DECISION NO. 251/90 (01/06/90) Moore Cook Kowalishin

Delay (onset of symptoms) - Pensions (assessment) (back).

A construction labourer fell about eight feet in 1979 in an accident in which he injured his back, lost consciousness and knocked out eight teeth. He was awarded a 25% pension for low back disability.

The Panel found that the worker also suffered a neck injury in the accident. Although symptoms did not become prominent until 1981, the Panel was satisfied that the worker did suffer the neck injury, considering the mechanics of the accident and medical opinion. The worker was temporarily disabled beyond his pension level from March 1981 to November 1981 and entitled to full benefits.

The Panel confirmed the 25% pension level for the low back disability. A 25% pension was consistent with the symptoms described by the worker. [8 pages]

DECISION NO. 313/90 (01/06/90) Bigras Robillard Seguin

Delay (claim).

A department store clerk was not entitled to benefits for a back injury which she claimed she suffered while unpacking boxes in 1981. The worker did not make a claim until 1985. She had previous back problems. There was no immediate reporting of the injury and no immediate of lay-off. [8 pages]

Board Directives and Guidelines: Claims Adjudication Branch Procedures Manual, Document no. 33-01-02

DECISION NO. 323/90 (05/06/90) Faubert Cook Barbeau

Temporary disability (beyond pension level) - Maximal medical rehabilitation.

The worker suffered a right hand injury in 1981. In November 1983, she underwent surgery for carpal tunnel syndrome and received benefits until December 1983, when she was awarded a 10% pension. In September 1986, she underwent further surgery for a stenosing triggering phenomenon in the right thumb.

The worker was not entitled to temporary benefits from December 1983 to September 1986. The worker suffered permanent damage to the median nerve which could not be corrected by the surgery in 1983. Her condition was permanent. She was able to carry out her employment until the time of the surgery in 1986. [7 pages]

DECISION NO. 297/90 (05/06/90) McGrath Robillard Meslin

Access to worker file, s. 77.

Access to the worker's file was granted to the employer. [3 pages]

DECISION NO. 298/90 (05/06/90) McGrath Robillard Meslin

Access to worker file, s. 77.

Access to the worker's file was granted to the employer. [3 pages]

DECISION NO. 306/90 (05/06/90) McGrath Robillard Meslin

Access to worker file, s. 77.

Access to the worker's file was granted to the employer. [4 pages]

DECISION NO. 336/90I (05/06/90) Starkman Beattie Apsey

Procedure (absent parties) - Adjournment (peremptory hearing date) - Withdrawal (of appeal).

The worker's representative requested an adjournment of the worker's appeal. The worker could not attend the appeal because child care arrangements had collapsed. The appeal had previously been adjourned at the request of the worker.

The Panel reluctantly granted the adjournment but advised that the appeal will proceed on the rescheduled date, whether the worker appears or not.

The Panel noted that withdrawal of an appeal for purposes of achieving an adjournment or panel shopping would be refused. [3 pages]

DECISION NO. 134/90 (05/06/90) Bigras Cook Sutherland

Second Injury and Enhancement Fund.

The worker suffered a minor accident in July 1983 when she fell. She received temporary benefits from August 1983 to May 1984 and a 10% pension. She had suffered a prior back injury in 1980. The 1983 employer was awarded 50% SIEF relief.

The Panel found that the employer was entitled to 75% SIEF relief. The worker had degenerative disc disease which preexisted the 1980 accident. It was still symptomatic at the time of the 1983 accident. The Panel found the preexisting condition to be of moderate significance and the 1983 accident to be minor. According to Board guidelines, the employer was allowed 75% SIEF relief. [7 pages]

Board Directives and Guidelines: Claims Services Division Manual, s.108(2), p.235, Directive 1

DECISION NO. 335/90 (06/06/90) Faubert Rao Nipshagen

Access to worker file, s. 77.

Access to the worker's file was granted to the employer, except for one non-medical memo which was not relevant. [4 pages]

DECISION NO. 124/88R (06/06/90) Kenny Robillard Apsey

Reconsideration (consideration of evidence).

In Decision No. 124/88, the Panel dismissed an appeal from a decision denying sponsorship for academic upgrading and denying continuation of a temporary supplement. The worker requested reconsideration of Decision No. 124/88 on the grounds that the Panel misunderstood evidence regarding the worker's qualifications and that the Panel improperly considered age, disability and geographical location as the basis for denying service to the worker.

The request for reconsideration was denied. The Panel was well aware of the worker's qualifications. The Panel considered age, disability and geographic location not for the purpose of denying services to the worker but, rather, for the purpose of possible extension of services. [5 pages]

WCAT Decisions Considered: Decision No. 95R (1989), 11 W.C.A.T.R. 1; Decision No. 124/88 (1988), 9 W.C.A.T.R. 231; Decision Nos. 72R, 72R2

DECISION NO. 359/90 (06/06/90) Signoroni Fox Preston

Issue setting.

The worker suffered back injuries in 1973 and 1982, for which he was awarded 10% pensions for organic disability. The worker appealed denial of entitlement for psychotraumatic disability.

Considering the whole person concept, the Panel decided that the adjudication of the claim for psychotraumatic disability could not be separated from issues regarding fibromyalgia and chronic pain. There was insufficient evidence to adjudicate these issues. The matter was referred back to the Board with a request to expedite. [5 pages]

DECISION NO. 757/89 (06/06/90) McIntosh-Janis Lebert Seguin

Asthma - Exposure (grain dust).

The worker worked in a grinding mill from 1951 to until he laid off in 1979 due to asthma. The worker was responsible for bagging grain refined from soya meal, linseed meal and flax seed.

The worker was not entitled to benefits. Skin tests and challenge tests were either negative or, at most, weak positive. The objective medical tests and the preponderance of medical evidence of specialists did not support entitlement. [7 pages]

DECISION NO. 357/90 (06/06/90) Signoroni Drennan Meslin*Supplements, older worker.*

The worker suffered a low back injury in 1983, for which he was awarded a 10% pension and a temporary supplement until June 1988.

The worker was not entitled to an older worker supplement subsequent to June 1988. The worker had two non-compensable conditions. He refused a job in June 1988 because he felt that it would aggravate one of his non-compensable conditions. The Panel found that the worker's age was not a significant contributing factor in his unemployability or in his inability to be retrained. [5 pages]

WCAT Decisions Considered: Decision No. 320/88 (1988), 9 W.C.A.T.R. 292

DECISION NO. 320/90 (06/06/90) Bigras Felice Jago*Psychotraumatic disability.*

A carpenter injured the left side of his body in a fall in July 1983 and received benefits until October 1984. The worker appealed a decision of the Hearings Officer denying entitlement for psychotraumatic disability.

Board doctors were of the view that the worker had some depressive reaction and wilful exaggeration. Other doctors found that the worker was suffering from post-accident neurosis with somatization and depressive symptomatology, the most dramatic symptom of which was hemialgia, related to the compensable accident.

There was evidence, since five months after the accident, that the worker was suffering from depression resulting from his reaction to the situation in which he was placed by the accident. Contrary to the view of Board doctors, the Panel found the worker to be credible. There were numerous reports of exaggeration of symptoms but only Board doctors believed this over-reaction to be wilful. The Panel accepted the opinion of the other doctors that the worker had a psychotraumatic disability resulting from the compensable injury. This condition was not a chronic pain disorder.

The appeal was allowed. [18 pages]

WCAT Decisions Considered: Decision No. 915 (1987), 7 W.C.A.T.R. 1

Board Directives and Guidelines: Operational Policy Manual, Document nos. 03-03-03, 03-03-05; Chronic Pain Disorder Policy, Board Minute #2, July 3, 1987, p.5196

DECISION NO. 333/90 (07/06/90) Faubert Rao Nipshagen*Access to worker file, s. 77.*

Access to the worker's file was granted to the employer. [4 pages]

DECISION NO. 343/90 (07/06/90) Bigras Higson Nipshagen*Suitable employment.*

The worker suffered a crush injury to his hand in April 1984. He was authorized to return to modified

work in September 1984. The employer returned him to his regular job but with assistance for the more strenuous tasks. His supervisor gradually increased his workload until he could not keep up. Animosity developed between the worker and his supervisor. In October 1984, the worker and supervisor got into an argument during which the worker damaged some equipment and was dismissed. After considerable union-management negotiation, the worker was later reinstated.

The worker was entitled to benefits from October 1984 to June 1985. The dismissal was not a relevant issue since, on the evidence, the Panel found that the worker's job was not suitable for his capabilities. [6 pages]

DECISION NO. 345/90 (07/06/90) Signoroni Klym Preston

Available employment (offer from accident employer) - Availability for employment (job search).

The worker was discharged from HRC to modified employment in February 1987. The accident employer made modified work available to the worker but it was found to be unsuitable.

The employer submitted that it continued to be willing to accommodate the worker but could not do so because the worker failed to remain in touch with the employer. The Panel stated that the employer could have notified the worker of its ongoing willingness to provide modified work.

The worker still had an obligation to attempt to get back to work. From February 1987 to May 1987, she was entitled to full benefits since she was involved in active medical rehabilitation. From May 1987 to April 1989, she did not conduct a reasonable job search and, therefore, was not entitled to full benefits. [5 pages]

DECISION NO. 249/90 (08/06/90) Starkman Beattie Preston

Delay (claim).

The worker suffered a back injury in 1977 while moving a heavy machine. In 1980, he underwent surgery for a herniated disc. The Panel found that the worker was not entitled to benefits, considering delay in claiming benefits until 1987 and considering that the worker suffered non-compensable back injuries while engaged in sports activities and while pushing a car in snow. [9 pages]

DECISION NO. 402/90 (08/06/90) Carlan Rao Jago

Access to worker file, s. 77.

Access to the worker's file was granted to the employer. [3 pages]

DECISION NO. 334/90 (08/06/90) Faubert Rao Nipshagen

Access to worker file, s. 77 (issue in dispute) (commutation).

The worker appealed a decision granting access to the worker's file to the employer. The issue in dispute was a commutation of the worker's pension.

In the Board policy on commutation, certain medical considerations are relevant. The policy provides

for commutation when it enables the worker to maintain employment by reducing the effects of a disability or when it is established that the worker's financial situation is producing a disability. Therefore, it is important to know the extent of a worker's disability, the relationship between a worker's financial situation and a disability and whether the proposed use of the commuted pension is consistent with the worker's disability.

The employer was not entitled to access to older documents concerning treatment. However, it was entitled to documents since the time the worker was assessed for a pension. [6 pages]

Board Directives and Guidelines: Guidelines for the Commutation of Pensions, Board Minute 3, March 3, 1989, p.71

DECISION NO. 534/89 (08/06/90) Carlan Fox Ronson

Continuing entitlement - Chronic pain.

The worker slipped and fell in April 1983 and received benefits until August 1984. The Panel found that the Board's decision to terminate benefits in 1984 was correct according to Board policy at the time. However, there was now evidence of chronic pain. Rather than referring the matter back to the Board to determine entitlement for chronic pain, the Panel found that the worker was entitled to benefits for chronic pain and referred the matter back to the Board for assessment. [8 pages]

WCAT Decisions Considered: Decision No. 915 (1987), 7 W.C.A.T.R. 1

Board Directives and Guidelines: Chronic Pain Disorder Policy, Board Minute #2, July 3, 1987, p.5196

DECISION NO. 233/90 (08/06/90) Bigras Higson Nipshagen

Commutation (debt liquidation) (home mortgage) - Board Directives and Guidelines (commutation) (rehabilitative measure) - Pensions (lump sum) (amalgamation of claims) - Pensions (lump sum) (10% pension) (advantage to worker).

The worker sought a full commutation of his 10% pension for a low back disability. The worker had also received a 1.5% lump sum payment for white finger disease in 1984. Granting the commutation would turn a \$300 monthly deficit into a \$100 monthly surplus.

The Board was not compelled to offer the worker a lump sum payment at the time when the 10% pension was awarded in 1986. It had a discretion to not pay the lump sum where it found that this would not be to the advantage of the worker to do so. The Board's practice, not to grant commutations when it was deemed likely that the worker's condition was likely to deteriorate, was reasonable and in accordance with the wording of s.45(4).

Moreover, the worker's white hand disease and low back disabilities led to a combined impairment of earning capacity of 11.5%. Section 45(4) thus did not apply as the "whole person" should be considered in determining the degree of impairment of earning capacity.

The worker did not qualify pursuant to Board policy relating to s.26(1) commutations, since the commutation would not constitute a rehabilitative measure. The worker was back at work in another trade and was currently well on his way to a complete rehabilitation. The debts that would be cleared with the commutation were not threatening the worker's employment. Neither his physical nor psychological well-being

were affected by financial worries resulting from the present situation. The worker was not entitled to a commutation. [6 pages]

WCAT Decisions Considered: Decision No. 569/88 (1988), 9 W.C.A.T.R. 342

Other Statutes Considered: Interpretation Act, R.S.O. 1980, c.219, ss. 30.15, 30.34

Board Directives and Guidelines: Guidelines for the Commutation of Pensions, Board Minute #3, March 20, 1989, p.71

DECISION NO. 591/87 (08/06/90) Strachan Heard Mason

Class of employer (manufacturing machinery) - Class of employer (installation of heavy machinery).

The employer appealed a decision of the Hearings Officer confirming its classification in Class 23, Rate Group 827. The employer supplied and installed conveyor systems. The systems were partially constructed by its parent company in France and shipped directly to auto manufacturing customers. Other parts of the system were constructed in North America under subcontracts placed by the employer.

Class 10, Rate Group 246 applied to employers involved in the manufacture of machinery. Section 1(1)(r) of the Act defines manufacturing as including the assembly of the parts of any article or commodity. This broad definition, together with the description of Rate Group 246, was sufficient to encompass the service provided by the employer.

Class 23, Rate Group 827 applied to employers involved in the installation and repair of heavy machinery. This description was a more accurate description of the type of activity carried on by the employer since its end service was installation.

Where a broad definition and a narrow definition overlap, the narrow definition should prevail for classification purposes. Accordingly, the employer was classified properly in Rate Group 827.

The employer's competitors were classified in Rate Group 246. However, the Panel noted that the competitors were engaged principally in the actual production of the various parts required for the conveyor system, whereas the employer's sole end service was installation and assembly.

The appeal was dismissed. [7 pages]

WCAT Decisions Considered: Decision No. 160/87

Regulations Considered: Reg. 951, s.5; Schedule 1 class 10; Schedule 1 class 23

DECISION NO. 383/90 (08/06/90) Kenny Lebert Barbeau

Continuity (of complaint).

The worker suffered a back injury in 1981 when he tried to prevent a heavy weight from falling. The worker was entitled to benefits for his back condition in 1988. Considering evidence of continuity of complaint and treatment, the Panel found that the 1981 injury was a significant cause of the ongoing back disability. [8 pages]

DECISION NO. 23/90 (08/06/90) Hartman McCombie Clarke
Ciardullo v. Fritchley

Section 15 application - Second accident - In the course of employment (travelling) - Worker (status) (during medical appointment).

In the hearing of a s.15 application and entitlement appeal, the Panel considered whether the deceased worker was in the course of employment at the time of a fatal motor vehicle accident and whether the worker's widow was entitled to dependency benefits.

The worker suffered a neck and arm injury in July 1985. In December 1985, he was admitted into HRC. In January 1986, after being released from HRC, the worker was driving back home when his car crossed the median of the highway and the worker was involved in the fatal accident. It was not known why the car crossed the highway.

It is a general rule that injuries occurring while proceeding to or from work are not compensable. Board guidelines provide also that accidents while en route to or from a treating agency are not compensable. On the s.15 application, the Panel found that the worker was not in the course of employment in the sense required by s.8(9). The worker was on a public highway and was not under the control of his employer or the Board.

On the appeal, the Panel found that the widow was not entitled to dependency benefits. There was no causal relationship between the fatal accident and the 1985 accident or treatment. Of two similar Tribunal decisions, one did not grant benefits for a second accident while travelling to see a doctor and the other granted benefits but the accident occurred on a prospective employer's premises. [14 pages]

WCAT Decisions Considered: Decision No. 44 (1986), 2 W.C.A.T.R. 8; Decision No. 547/87 (1988), 8 W.C.A.T.R. 160;
Decision Nos. 629/89, 673/89
Board Directives and Guidelines: Claims Adjudication Branch Procedures Manual, Document no. 33-27-01

DECISION NO. 897/88 (08/06/90) Strachan Lebert Merritt
Toronto Security Services Inc. v. Holender

*Section 15 application - In the course of employment (termination of employment) -
In the course of employment (personal activity) - In the course of employment (predominant risk test) -
In the course of employment (contemporaneity) - Class of employer (operation of apartment building).*

The plaintiff worked for a property management company that managed a residential apartment complex. The defendants were the security company and an employee of the security company that provided security services at the apartment. On the last day of the plaintiff's employment, she went to the washroom before going home. She was bitten by a guard dog that had been left in the washroom by the defendant worker.

The Board did not consider the property management company to be a Schedule 1 employer. It interpreted operation of an apartment building in Class 25 as being restricted to tasks associated with caretaking/janitorial services. The Panel found that "operation" of an apartment involved overall management and conduct of activities associated with the building. For the purposes of this application, the property management company was a Schedule 1 employer.

Generally, a worker remains in the course of employment for a reasonable period while winding up and leaving the employer's premises. The plaintiff was in the course of employment at the time of the accident. The fact that it was her last day of employment made no difference.

The defendant worker brought the guard dog by car to the apartment at least one and one-half hours prior to the start of his shift and locked it in the washroom while he returned the car to his sister. The Panel found that the predominant character of his activity in delivering the dog early was of a personal nature.

Accordingly, he was not in the course of employment at the relevant time. Therefore, the plaintiff's right of action was not taken away. [15 pages]

WCAT Decisions Considered: Decision No. 84 (1986), 3 W.C.A.T.R. 38; Decision No. 759/88

Regulations Considered: Reg. 951, Schedule 1, Class 25 item 10

Cases Considered: Meyer v. W.C.B. (1986), 15 O.A.C. 202; Nancollas v. Insurance Officer, [1985] 1 All E.R. 833

**DECISION NO. 775/89 (08/06/90) Hartman Robillard Seguin
Dover Corp. (Canada) Ltd. v. Gill**

*Section 15 application (remoteness) - In the course of employment (contemporaneity) -
In the course of employment (multi-storey buildings) - Supplier of motor vehicle, machinery or equipment
(maintenance of equipment).*

The plaintiff was a secretary who was sent by her boss to get coffee for a meeting. While going down to the lobby to get the coffee, the elevator suddenly dropped and then suddenly stopped, injuring the plaintiff. The defendant manufactured and maintained the elevator.

The Panel found that the worker was in the course of employment at the time of the accident.

For s.8(9) to apply, it was not necessary for workers of the defendant to be in the course of employment at the exact moment of the accident. Rather, it was necessary for them to be in the course of employment at the relevant time. In this case, it was not known what caused the elevator to overspeed. For example, it was not known whether it was caused by the elevator's internal electrical and mechanical make-up, by failure of a maintenance mechanic to note a defect or by a fault in the building's electrical circuitry. On the evidence before it, the Panel could not conclude that a worker of the defendant was in the course of employment at the relevant time. Accordingly, the right of action was not taken away.

Even if s.8(9) were applicable, the right of action would not have been taken away since the defendant supplied machinery or equipment without supplying workers to operate it. Elevators are essentially self-operating. The technician who performed maintenance was not an operator in the sense envisaged by s.8(10).

WCAT Decisions Considered: Decision No. 84 (1986), 3 W.C.A.T.R. 38; Decision No. 503/87 (1988), 8 W.C.A.T.R. 156;

Decision No. 965/87 (1988), 8 W.C.A.T.R. 214; Decision Nos. 422, 479/87, 1186/87

Board Directives and Guidelines: Claims Adjudication Branch Procedures Manual, Document no. 33-05-02

Cases Considered: Meyer v. W.C.B. (1986), 15 O.A.C. 202

DECISION NO. 302/90 (11/06/90) Faubert Higson Barbeau

Access to worker file, s. 77.

Access to the worker's file was granted to the employer. [3 pages]

DECISION NO. 9/90 (11/06/90) Hartman McCombie (dissenting) Meslin

Disability (disabled from working).

A press operator suffered a low back injury in April 1987 when he lifted a heavy head from a press without help. He received benefits on an aggravation basis until July 1987.

The majority of the Panel found that the worker was not entitled to benefits subsequent to July 1987. The worker could have returned to his regular work at that time. The worker's doctor stated that the worker could return to work that did not require repetitive lifting over 25 pounds. The worker's job required some bending and lifting but it was not excessive or repetitive. His job did not require lifting of paper over 25 pounds. The lifting of the press head was done only three or four times per week and was generally done with the help of co-workers. The majority concluded that the worker was capable of his regular work and that there was no temporary disability subsequent to July 1987.

The Worker Member, dissenting, distinguished between disability and suitable work. The Worker Member found that there was residual discomfort. This was a disability since it precluded the worker from lifting the press head, which previously he had been able to do. The Worker Member found that the worker was temporarily partially disabled subsequent to July 1987 and entitled to 50% benefits. [12 pages]

WCAT Decisions Considered: Decision No. 121 (1986), 3 W.C.A.T.R. 81; Decision No. 137 (1987), 4 W.C.A.T.R. 87

DECISION NO. 301/90 (11/06/90) Faubert Higson Barbeau

Access to worker file, s. 77. (issue in dispute) (SIEF) - Jurisdiction, Tribunal (section 77).

Access to the worker's file was granted to the employer, except for one report relating to prior surgeries not related to the work injury. The issue in dispute was SIEF relief due to a preexisting psychological condition. Intrusive investigations into the worker's personal history are not to be encouraged from a policy perspective. Access to personal non-psychiatric information, not related to the compensable accident or treatment arising out of that accident, should not be granted to permit the employer to speculate that a worker may be predisposed to a psychiatric disorder. In this case, the report was not obviously relevant to a claim that the worker suffered from a preexisting psychological condition.

The Tribunal did not have jurisdiction to update access since the date of the appeal to the Tribunal. [7 pages]

WCAT Decisions Considered: Decision No. 704/87 (1987), 6 W.C.A.T.R. 220; Decision No. 431/89 (1989), 11 W.C.A.T.R. 355; Decision No. 941/87

Board Directives and Guidelines: Claims Services Division Manual, s.108(2), p.235, Directive 1

DECISION NO. 413/90 (12/06/90) Kenny Robillard Clarke

Access to worker file, s. 77.

Access to the worker's file was granted to the employer. [3 pages]

DECISION NO. 411/90 (12/06/90) Kenny Robillard Clarke

Access to worker file, s. 77.

Access to the worker's file was granted to the employer. [3 pages]

DECISION NO. 403/90I (12/06/90) Kenny Higson Meslin

Three week rule (documents) - Adjournment (additional evidence).

The employer submitted a document that did not comply with the three week rule. Material on file had clearly raised the issue referred to in the document. The Panel decided to review the document to determine whether it was sufficiently important to warrant waiving the three week rule. However, the employer did not have the entire document at the hearing.

The Panel adjourned the hearing and set out the procedure it would follow to determine whether the document should be admitted. On the basis of evidence heard so far, the Panel directed other evidence be obtained as well. [5 pages]

DECISION NO. 173/89R2 (12/06/90) Moore Fuhrman Seguin

Reconsideration (new evidence).

In Decision No. 173/89, the Panel granted a commutation of the worker's pension. In Decision No. 173/89R, the Panel revoked the earlier decision because the commuted sum could have been put at risk in bankruptcy proceedings in which the worker was involved.

The worker applied for further reconsideration since the bankruptcy proceedings were complete. The Panel granted the further application for reconsideration. Since the Panel was concerned that the worker's financial situation may have changed from the time of the original appeal hearing, the Panel directed that the appeal be re-opened and a new hearing scheduled. [4 pages]

WCAT Decisions Considered: 173/89, 173/89R

DECISION NO. 1010/89 (12/06/90) Carlan Drennan Clarke

Delay (onset of symptoms).

The worker suffered a shoulder injury in 1977. The Panel found that the worker also suffered a neck injury in the compensable accident. Although neck complaints were not reported to the Board until 1981, there was documented reference to neck pain as early as 1978. The Panel accepted medical opinion of a relationship between the accident and the cervical disability. [6 pages]

DECISION NO. 847R (12/06/90) Starkman Cook Preston

Reconsideration (clarification of decision).

In Decision No. 847, temporary benefits were granted to the worker from January 1984 to July 1984 for a back disability related to an accident in 1979. Benefits subsequent to July 1984 were denied since the disability after that date was related to a non-compensable condition.

The Panel clarified Decision No. 847 by stating that Decision No. 847 was considering only the question of temporary benefits subsequent to July 1984 and that it did not intend to preclude the worker from being considered for a pension. [6 pages]

WCAT Decisions Considered: 72R2, 847

Practice Directions Considered: Practice Direction No. 8 (1987), 1 W.C.A.T.R. 233

DECISION NO. 275/8912 (12/06/90) Moore Robillard Preston

Referral to Board - Pensions (assessment) (white finger disease) - Pensions (Rating Schedule) (Taylor/Pelmeare scale).

In Decision No. 275/891, the Panel found that the worker's white finger disease fell within the moderate range of the Taylor/Pelmeare scale and directed the Board to assess the impairment of earning capacity based on that finding.

The Board's pension assessor reassessed the worker and confirmed the 1.5% pension without reference to the Taylor/Pelmeare scale.

The Panel stated that it did not direct the Board to reassess the worker but, rather, to provide a benchmark rating based on the Panel's findings of moderate symptoms on the Taylor/Pelmeare scale. The Panel also had concerns that the manner in which the worker was tested did not meet the optimum testing procedure.

The Panel directed the Board to provide the Panel with the ranges for all five stages of white finger disease referred to in the Taylor/Pelmeare scale. [7 pages]

WCAT Decisions Considered: 275/891

DECISION NO. 180/90 (12/06/90) Marcotte Lebert Nipshagen

Delay (treatment) - Benefit of the doubt.

A postal worker appealed a decision of the Hearings Officer denying entitlement for a low back disability in May 1986 which the worker related to flip sorting work in January 1986. The worker claimed that the tubs for the mail were made of plastic at that time rather than the usual wire mesh and that the plastic tubs were harder to grip.

There was a delay in seeking treatment until May 1986 but there was some continuity of complaint. The employer could not be specific as to when plastic tubs were in use. Applying the benefit of the doubt, the worker was entitled to benefits. [9 pages]

Board Directives and Guidelines: Claims Adjudication Branch Procedures Manual, Document no. 33-01-02; Claims Services Division Manual, s.1(1)(a), p.1, Directive 2; Interpretation Bulletin, Interpretation of Personal Injury by Accident, Chance Event and Disablement, October 19, 1988

DECISION NO. 270/90 (12/06/90) Kenny Higson Jago

In the course of employment (repairing own equipment) - Arising out of employment (reasonably incidental activity test).

The worker was a skidder operator. He was paid based on his production. Half of his payment was treated as wages and the other half was considered rental for the skidder. The worker was responsible for providing his skidder and he paid for all repairs and fuel.

On a Thursday the worker's skidder had a flat tire. For the remainder of that day, and all of Friday, he worked with his brother who was also a skidder operator for the same employer. Friday evening, while the

worker was replacing the tire at a garage in his home town -- located 75 miles from the job site -- the tire exploded and injured him. The employer did not pay for repairs or exert control over where and how they were to be performed. The Hearings Officer found that the repairs were not "emergency repairs" and that the worker was not in the course of his employment, as the work was done after hours.

Though the worker was able to continue working for a short period without his skidder, he suffered a reduction of income without it and the employer suffered a reduction in production. Repair of the skidder thus benefitted both the worker and the employer. The worker repaired the skidder at the time and in the manner that he did, in order that he could work on Saturday. Having a skidder in working order was part of the employment. Repairing the tire was thus a reasonably incidental activity to the employment.

Since, at the time of the injury, the worker was where he was because of his employment, he was in the course of his employment. Since the injury was caused by the work-related activity of changing the tire, it arose out of the employment. The worker's appeal was allowed. [7 pages]

WCAT Decisions Considered: Decision No. 229 (1986), 2 W.C.A.T.R. 118; Decision Nos. 24F, 585/89
Board Directives and Guidelines: Claims Services Division Manual, s.3(1), p.47, Directive 19

DECISION NO. 243/90 (12/06/90) Hartman Lebert Ronson

Continuity (of treatment).

The worker suffered a compensable lumbosacral strain in 1977, but returned to work in modified duties which he was able to perform. In 1978 the worker suffered a serious arm injury. Since that time he had only worked a total of eight and one-half months.

Back pain, for which the worker sought treatment in 1983, was not causally related to the 1977 accident.

It was more probable than not that the worker had recovered from the 1977 accident, as evidenced by his return to work and the five or six year gap in treatment. There was no medical opinion relating the 1983 onset of symptoms to the 1977 accident and the worker's own recollection was poor. [7 pages]

DECISION NO. 531/88 (13/06/90) McGrath Cook (dissenting) Preston

Carpal tunnel syndrome - Neuropathy (ulnar) - Evidence (weight) - Evidence (witness) (conflict of interest).

The employer appealed a decision of the Hearings Officer granting benefits for carpal tunnel syndrome and ulnar neuropathy.

In preliminary matters, the Panel decided that it was not necessary for a kinesiologist to be present at the hearing even though his report was included in evidence since the Tribunal accepts documentary evidence. The Panel also found no inherent conflict of interest from the fact that the employer's expert witness had previously been a Board consultant who had rejected the worker's claim. Both matters could affect the weight attached to the evidence.

The majority of the Panel accepted that for carpal tunnel syndrome to be compensable, there must be work that was not only repetitive but also stressful and that for ulnar neuropathy to be compensable there must be repetitive flexion and extension of the elbows. The majority found that the work performed by the worker was not sufficiently repetitive or stressful to have been a significant contributing factor to her disabilities. The appeal was allowed.

The Worker Member, dissenting, agreed that the ulnar neuropathy was not compensable but would have granted benefits for carpal tunnel syndrome. The worker's job required repetitive wrist activity with

flexion and extension with some force. The work activity was a significant contributing factor to the carpal tunnel syndrome. [14 pages]

WCAT Decisions Considered: 889/89

DECISION NO. 639/88L (13/06/90) Strachan Lebert Mason

Leave to appeal (substantial new evidence) (medical report).

The Appeal Board granted benefits for a low back condition from February 1981 to February 1982.

On a leave to appeal application, the most useful type of new evidence is evidence which contains new factual findings. An opinion based upon the old facts is less useful. However, if the opinion is definite and does not merely raise the possibility of a different conclusion, this type of new evidence may also, in some cases, meet the test of being substantial.

In this case, a new report raised the possibility of a different conclusion. The report considered a neck disability. However, in any event, the evidence indicated that the worker was not disabled beyond February 1982.

Leave to appeal was denied. Leave was not required to pursue entitlement for a right shoulder disability since this condition was not considered by the Appeal Board. [7 pages]

DECISION NO. 811/88 (13/06/90) Strachan Heard Jewell

Disablement (change in work) - Tenosynovitis (de Quervain's disease).

The worker appealed a decision of the Hearings Officer denying entitlement for a wrist disability. The worker had worked on an assembly line for 14 years making light bulbs. In the summer of 1984, she was assigned to a job in quality control, which involved opening boxes, testing light bulbs and repacking the boxes. In December 1984, the worker laid off.

There was a diagnosis of de Quervain's tenosynovitis. Even if this case were considered as an industrial disease, the worker must still demonstrate that the condition had a causal relationship to work, since the presumption in s.122(9) did not apply for tenosynovitis, which was listed in Schedule 3 but without also listing a process.

There was a temporal relationship between the change in job duties and the onset of symptoms. However, there is also evidence that the use of her hand in the new duties involved use of the adductors, whereas the worker's condition involved the extensors. The job was not strenuous. In addition, the worker's condition did not improve after the lay-off. The worker had other complaints by March 1985, suggesting that this generalized condition was not related to employment. The appeal was dismissed. [12 pages]

Regulations Considered: Reg. 951, Schedule 3

Board Directives and Guidelines: Claims Services Division Manual, s.122(1), p.248, Directive 1

DECISION NO. 358/90 (14/06/90) Moore Lebert Apsey*Chronic pain.*

The worker suffered multiple injuries, including skull and rib fractures, in a fall in 1974. In 1978, he was awarded a 10% pension for a residual neck disability.

The worker was not entitled to benefits for chronic pain. Explanations for the worker's continuing pain were somewhat divergent but all cited organic origins. The Panel found that the worker's disability was organically based and appropriately assessed by the Board on that basis. [7 pages]

DECISION NO. 368/90 (14/06/90) Moore Lebert Clarke*Impairment of earning capacity - Pensions (assessment) (back).*

The worker suffered low back injuries for which he was awarded a 15% pension. Over the last ten years, his condition had deteriorated and the pension was increased a number of times until the current level of 40%.

The Panel noted the difference between impairment and disability. Even though the worker may be totally disabled, the pension is awarded for impairment of earning capacity, based on the usual impact of similar injuries on the earning capacity of average unskilled workers.

The Board awarded 10% more than the 30% awarded for a fully dysfunctional lower back. This recognized whatever neurological deficits the worker may have been experiencing. The Panel found that the 40% award was an accurate estimate of the degree of impairment. [9 pages]

WCAT Decisions Considered: Decision No. 915 (1987), 7 W.C.A.T.R. 1

DECISION NO. 382/90I (14/06/90) Starkman Rao Preston*Issue setting - Referral to Board.*

The worker suffered a back injury in 1981. The worker appealed a decision of the Hearings Officer denying entitlement for a recurrence in 1985. At the hearing it became apparent that the worker intended to apply for a pension for residual disability resulting from the 1981 accident.

The Panel felt it would be preferable for the Board to consider pension entitlement prior to the Panel deciding entitlement to temporary benefits. The matter was deferred for three months to allow the Board to determine entitlement to a pension. [5 pages]

DECISION NO. 431/90 (14/06/90) Strachan Drënnan Meslin*In the course of employment (repairing own equipment) - Board Directives and Guidelines (in the course of employment) (repairing own equipment) - Personal coverage.*

The worker was a contract truck driver. He had his own trucks and was fully responsible for maintenance and repairs. He injured his ankle while changing the oil on a Sunday afternoon.

The worker had personal coverage, which was submitted through the employer. The Panel noted that if the worker had been a full time worker for the employer, it would have been a contravention of s.18 for the

employer to deduct workers' compensation premiums. However, the worker was a contract worker only and the employer merely assisted the worker administratively by remitting premiums on his behalf.

The accident arose out of employment since the work was a normal part of work activity for a contract employee. Board guidelines regarding workers repairing their own equipment, provide that workers are not entitled to benefits for accidents occurring while performing maintenance after hours. The Panel found that the Board guideline was not intended to apply to a person with personal coverage whose normal duties include performing maintenance. The reason a contract worker takes out personal coverage is to cover activities related to the services provided under the contract with the employer. The worker was entitled to benefits. [7 pages]

Board Directives and Guidelines: Claims Services Division Manual, s.3(1), p.47, Directive 19

DECISION NO. 654/88 (14/06/90) Signoroni Cook Apsey

Pensions (assessment) (wrist) - Jurisdiction, Tribunal (final decision of Board).

The worker had been awarded only a 2% pension on the basis that there was a non-compensable component to his right hand/wrist disability which was attributable to carpal tunnel syndrome. In Decision No. 654/88I the Panel accepted a medical opinion that it was unlikely that any of the disability arose from carpal tunnel syndrome, rather, the symptoms were common to this type of injury, a deep two-inch laceration to the radial side of the lower right forearm that required 10 stitches. The Panel asked the Board to reassess the pension on this basis and the Board increased the rating to 5%.

The worker's disability made it more difficult for him to grasp things. As a result of hyperaesthesia, the back of his hand was sensitive to touch and temperature. In other words, the worker had the function of his right hand but that function was limited by pain, sensitivity and loss of strength. The doctor whose opinion the Panel had accepted in the interim decision, and the Board doctor who performed the reassessment, both agreed on the nature of the disability, but they disagreed slightly on the degree of the disability. The Board doctor considered the degree of the disability to be slightly less. The Panel accepted the other doctor's assessment of the degree of the disability and increased the pension to 7%.

The Panel did not deal with the worker's argument that he was entitled to an enhancement factor due to a subsequent left thumb injury which also weakened his grip in the left hand. That issue had not been addressed at the Board level and was only raised fully in the post-hearing submissions at the Tribunal. [12 pages]

WCAT Decisions Considered: Decision No. 915 (1987), 7 W.C.A.T.R. 1; Decision No. 831/88 (1989), 10 W.C.A.T.R. 334; Decision No. 654/88I

Board Directives and Guidelines: Claims Adjudication Branch Procedures Manual, Document no. 33-28-03

DECISION NO. 311/90I (15/06/90) Hartman Klym Jago

Issue setting.

A cashier appealed a decision of the Hearings Officer denying entitlement for disablement in 1986. The worker was prepared to argue only the issue of entitlement on the basis of organic disability. However, the worker indicated that she may pursue a claim for chronic pain or fibrositis.

The hearing was adjourned. The worker was to decide whether she would be pursuing a claim for chronic pain or fibrositis at the Board. If so, any appeal of the Board decision on chronic pain or fibrositis should be heard together with the reconvened hearing of this appeal. If the worker decides not to pursue the

claim at the Board, the hearing should be reconvened with the parties prepared to argue both organic and non-organic disability.

The employer was entitled to some certainty as to its obligations in a reasonable period of time. A specific time frame for action should be established between the worker, the employer and the Tribunal Counsel Office. [5 pages]

DECISION NO. 401/89 (15/06/90) Faubert Lankin Seguin

Disablement (awkward position).

The worker operated an electrifier machine at a fur cleaning company. The worker claimed entitlement for a low back strain on the basis of having to do strenuous work in an awkward position.

The worker was not entitled to benefits. On the evidence, the Panel found that the worker did not have to remain in an awkward position or perform strenuous movements. In addition, the work load was not heavier at the time of year when the onset of symptoms occurred. [10 pages]

Board Directives and Guidelines: Claims Adjudication Branch Procedures Manual, Document no. 33-01-02; Interpretation Bulletin, Interpretation of "Personal Injury by Accident", "Chance Event", and "Disablement", October 19, 1988

DECISION NO. 410/90 (15/06/90) Starkman Felice Apsey

Jurisdiction, Tribunal (final decision of Board) - Recurrences (compensable injury).

The worker suffered back injuries in January 1982 and July 1982. In February 1984, the Appeals Adjudicator found that the worker was not entitled to temporary benefits beyond September 1983 and that this completed the worker's entitlement under the claim on the basis that the worker had completely recovered from his compensable injuries. The worker claimed entitlement for a recurrence in November 1984 but the Board would not consider further entitlement because of the decision of the Appeals Adjudicator.

The Panel stated that it was not appropriate for an adjudicator's decision to preclude a worker from pursuing further benefits based on a deterioration or aggravation of a prior compensable condition subsequent to the date of the adjudicator's decision.

The matter of continuing entitlement subsequent to September 1983 had not been adjudicated by the Board. The Panel directed the Board to process the worker's claim. [6 pages]

DECISION NO. 370/90 (18/06/90) Stewart Robillard Meslin

Access to worker file, s. 77.

Access to the worker's file was granted to the employer. [3 pages]

DECISION NO. 772/89 (18/06/90) Marcotte McCombie Preston

Recurrences (compensable injury) - Intervening causes.

The worker suffered a low back injury in December 1983 and returned to work in April 1984. The worker was not entitled to benefits for his back condition in September 1984. On the evidence, the worker's condition which resulted from the 1983 accident had resolved to the point where he was able to perform his regular duties by May 1984. The worker's back condition in September 1984 was likely related to work he performed building a veranda at home. This was an intervening event which broke the chain of causation. [9 pages]

DECISION NO. 414/90 (18/06/90) Bigras Robillard Barbeau

Medical examination (section 21) - Withdrawal (of application).

The employer requested that the worker attend an examination by an occupational physician. The parties reached an agreement that the worker would attend the examination and that the employer would offer suitable modified work, as recommended by the doctor. The application was withdrawn. [3 pages]

DECISION NO. 396/90 (18/06/90) Bigras Robillard Barbeau

Access to worker file, s. 77.

Access to the worker's file was granted to the employer. [3 pages]

DECISION NO. 371/90 (19/06/90) Stewart Robillard Meslin

Access to worker file, s. 77.

Access to the worker's file was granted to the employer, except for several references to a matter that was not relevant to the issue in dispute. [3 pages]

DECISION NO. 369/90 (19/06/90) Stewart Robillard Meslin

Access to worker file, s. 77.

Access to the worker's file was granted to the employer, except for several references to an irrelevant medical condition and one report which pertained to another worker. [3 pages]

DECISION NO. 239/90 (20/06/90) Chapnik Higson Meslin

Subsequent incidents (outside work).

A millwright suffered a low back injury in July 1981. The worker was not entitled to benefits in

September 1986. The worker aggravated a preexisting degenerative condition in the compensable accident. His condition returned to its pre-accident state by September 1983. His condition in 1986 was related to the pre-existing condition and an incident at home in September 1986. [6 pages]

DECISION NO. 422/90 (20/06/90) Moore Robillard Barbeau

Access to worker file, s. 77 (non-medical information).

Access to the worker's file was granted to the employer.

The Panel noted that the Board released Board memos to the employer prior to the worker's appeal under s.77. Usually, these documents do not contain medical information. However, in this case, they did contain sensitive medical information.

The Panel suggested that the Board review all Board memos to determine whether they contain medical information which should be held back pending the resolution of any appeal under s.77. [4 pages]

DECISION NO. 1115/87LR (20/06/90) Moore Robillard Seguin

Reconsideration (new evidence).

The Appeal Board denied benefits for a back disability in 1981 based on lack of continuity of complaint and treatment between the accident in 1977 and the disability. In Decision No. 1115/87L, the Panel denied leave to appeal.

The worker submitted new medical reports in support of an application to reconsider Decision No. 1115/87L. The application to reconsider was denied. The reports speculated as to a relationship between the condition and the compensable accident but did not address the issue of the absence of continuity, which was the central reason for the Appeal Board's decision. [4 pages]

WCAT Decisions Considered: Decision No. 95R (1989), 11 W.C.A.T.R. 1; Decision Nos. 72R, 72R2, 1115/87L

DECISION NO. 423/90 (20/06/90) Moore Robillard Barbeau

Access to worker file, s. 77.

Access to the worker's file was granted to the employer. [4 pages]

DECISION NO. 424/90 (20/06/90) Moore Robillard Barbeau

Access to worker file, s. 77.

Access to the worker's file was granted to the employer. [3 pages]

DECISION NO. 30/90 (20/06/90) Signoroni Cook Jago

Commutation (debt liquidation) - Procedure (post-hearing submissions) - Withdrawal (of appeal).

The worker appealed denial of a partial commutation of his pension for the purpose of debt liquidation and purchase of a truck.

After the hearing, the worker's representative sent the Panel unsolicited submissions. Several days later, the worker also sent further submissions. On an exceptional basis, the Panel accepted the submissions of the worker's representative only. These submissions suggested as an alternative that the Panel direct the Board to institute on the job training prior to the commutation for purchase of the truck. The Panel noted that it could not direct the Board in this manner. The Panel interpreted the submission as an admission that the commutation for purchase of the truck could not be properly assessed yet. This aspect of the appeal was considered withdrawn.

The worker was still suffering from a non-organic condition of unknown severity and duration. A commutation for debt liquidation would have short term benefits but there was no persuasive evidence that it would serve that worker's long term best interests. The appeal regarding debt liquidation was dismissed. [6 pages]

DECISION NO. 325/90 (20/06/90) McGrath Lebert Apsey

Continuity (of treatment).

The worker aggravated preexisting degenerative disc disease in a compensable accident in September 1985. He returned to regular work doing heavy labour in November 1985.

The worker was not entitled to benefits in November 1986. There was a lack of continuity of complaint and treatment. The Panel found that the worker's condition returned to its pre-accident state. Although the accident may have contributed minimally to the disability subsequent to November 1986, it was not a significant contributing factor. [7 pages]

DECISION NO. 277/90 (20/06/90) McGrath Robillard Preston

Continuing entitlement.

The worker received benefits for a back strain sustained in February 1987. Benefits were paid up to August 1987, when an orthopaedic specialist adjudged the worker as being able to return to his regular employment. None of the medical reports related the worker's pain subsequent to August 1987 to the accident. In fact, the doctors were unable to find anything upon which they could make a diagnosis. The worker was not entitled to benefits subsequent to August 1987. [6 pages]

DECISION NO. 421/90 (20/06/90) Moore Robillard Barbeau

Access to worker file, s. 77.

Access to the worker's file was granted to the employer. [3 pages]

DECISION NO. 257/90L (21/06/90) Chapnik Higson Meslin

Leave to appeal (good reason to doubt correctness) (evidence to support Appeal Board conclusion).

The Appeal Board granted a 15% pension for psychological disability and confirmed a 15% pension for organic disability. There was evidence to support the Appeal Board conclusion. Leave to appeal was denied. [7 pages]

WCAT Decisions Considered: Decision No. 131 (1986), 2 W.C.A.T.R. 77; Decision No. 109

DECISION NO. 394/90 (21/06/90) Starkman Fox Howes

Access to worker file, s. 77 (issue in dispute).

Correspondence from the Board to the worker granted the worker entitlement to benefits and, as such, was a decision of the Board to which the employer could object.

Access to the worker's file was granted to the employer. [4 pages]

DECISION NO. 392/90 (21/06/90) Starkman Fox Howes

Access to worker file, s. 77.

Access to the worker's file was granted to the employer. [3 pages]

DECISION NO. 393/90 (21/06/90) Starkman Fox Howes

Access to worker file, s. 77.

Access to the worker's file was granted to the employer. [3 pages]

DECISION NO. 395/90 (21/06/90) Starkman Fox Howes

Access to worker file, s. 77.

Access to the worker's file was granted to the employer. [3 pages]

DECISION NO. 373/90 (21/06/90) Bradbury McCombie Preston

Overpayment - Jurisdiction, Tribunal (overpayment).

The worker appealed a decision of the Hearings Officer which directed recovery of an overpayment. Initially, the Board granted benefits for a lay-off in December 1979. However, in 1981 the Board reversed its earlier decision. An appeal to the Tribunal was dismissed. As a result, there was an overpayment of \$15,000.

The Panel rejected the Board's submissions that overpayment were a purely administrative matter over which the Tribunal had no jurisdiction. The Panel found that there was a final decision of the Hearings Officer and that overpayment were incidental to the question of entitlement. Pursuant to ss.86g(1)(b) and 86g(3), the Tribunal had the same jurisdiction as the Board respecting recovering of overpayment.

In this case, the worker was informed in 1981 that the Board had reversed its decision. Yet, he never made any attempt to arrange for repayment, even though he has been working steadily since 1981. Since the worker felt that he was entitled to the money, he did not even attempt to claim sickness and accident benefits from the employer's private insurer, which could give him money to reimburse the Board. Although there was no fraud or misrepresentation on the part of the worker in making the claim, there was no basis for waiving the overpayment. The appeal was dismissed. [8 pages]

WCAT Decisions Considered: Decision No. 182 (1988), 10 W.C.A.T.R. 1; Decision No. 918/87 (1988), 8 W.C.A.T.R. 197; Decision No. 456/87

DECISION NO. 416/90 (21/06/90) Signoroni Klym Seguin
Gioiosa v. Lefebvre

Section 15 application - Executive officers.

The plaintiff in a civil action was the president of a home improvement company. He was in charge of an installation crew. This occupied about 95% of his time. The balance of his time was spent taking measurements and ordering material. He was not involved in the day to day running of the company. The vice-president was the person who carried on the executive functions.

The Panel found that the plaintiff, irrespective of his title of president of the company, was also a worker for compensation purposes at the time of the accident. The plaintiff's right of action was taken away. [8 pages]

WCAT Decisions Considered: Decision No. 516 (1987), 4 W.C.A.T.R. 210; Decision No. 964/87
Cases Considered: Ryan v. W.C.B. (1985), 6 O.A.C. 33

DECISION NO. 531/89 (21/06/90) Signoroni Felice Seguin

Medical opinion (venous condition) - Thrombosis (deep venous) - Embolism (pulmonary) - Post-phlebotic syndrome.

In August 1966, the worker suffered a sprain and crush injury to his foot. He returned to work after one month and wore an elastic bandage for a further month. The worker appealed a decision of the Hearings Officer denying entitlement for deep venous thrombosis and a pulmonary embolism, which occurred about one month after surgical repair of a right hydrocele in 1985.

The worker submitted that the 1966 accident caused a first undetected attack of deep venous thrombosis, that this condition was responsible for development of post-phlebotic syndrome evidenced by intermittent swelling and that these circumstances were determining factors that brought about the attack of deep venous thrombosis followed by the pulmonary embolism in 1985.

The Panel obtained a report from a s.86h assessor regarding venous disease in general and the worker's condition. The doctor stated that a person who has one attack of deep venous thrombosis is likely to develop another. The first attack unmasks a tendency that the individual had to develop blood clots in his system more easily than others. The worker could possibly have sustained an attack of deep venous thrombosis after the 1966 accident. However, the doctor would have expected more severe symptoms of varicose veins and

pigmentation of the leg during the 19 years which elapsed between the injury and the known attack in 1985. On balance, the doctor found insufficient evidence to make a diagnosis of deep venous thrombosis in 1966. Even if a minor attack had followed the 1966 injury, it could not be taken as a causal factor to the worker's condition in 1985, since the 1966 accident only unmasked the worker's tendency to develop deep vein thrombosis in response to certain stimuli such as trauma and operation.

The Panel accepted the medical assessor's opinion. The appeal was dismissed. [32 pages]

Appendices: Paper on Venous Disease by a s.86h medical assessor.

DECISION NO. 841/89 (22/06/90) Bradbury McCombie Jago

Delay (treatment) - Post-phlebitic syndrome - Thrombosis (deep venous) - Thrombosis (superficial venous)

The worker suffered a minor leg injury in May 1969. He lost no time until October 1970 when his leg started swelling. He suffered a further injury in September 1979 and received benefits on an aggravation basis until February 1980. He suffered another injury in June 1980, and has not returned to work. The worker appealed a decision of the Hearings Officer regarding benefits subsequent to 1980 for his condition, diagnosed as post-phlebitic syndrome.

Considering evidence from a s.86h assessor, the Panel found that the 1969 accident did not contribute to the worker's condition. Post-phlebitic syndrome is a condition of chronic pain and swelling which follows attacks of deep venous thrombosis. The condition in 1970, when the worker first received treatment, was not deep venous thrombosis. More likely, the worker had varicose veins with superficial venous thrombosis. Generally, superficial venous thrombosis will not trigger deep venous thrombosis. The worker's symptoms were not compatible with deep venous thrombosis and post-phlebitic syndrome until 1976.

The 1979 and 1980 accidents aggravated the preexisting post-phlebitic syndrome, considering the change in the worker's condition after those accidents. The worker was entitled to some temporary benefits and to be assessed for a pension. The appeal was allowed in part. [11 pages]

DECISION NO. 417/90 (22/06/90) Starkman Drennan Meslin

Supplements, temporary - Significantly greater than is usual - Availability for employment (job search) - Pensions (assessment) (fingers) (amputation).

A butcher caught his fingertips in a grinding machine. He was awarded a 1% pension for partial amputation of his right index finger.

The worker's impairment of earning capacity was significantly greater than is usual, considering the finger's extreme tenderness and sensitivity to cold, together with hearing loss and unavailability of his pre-accident job. However, the worker was not entitled to a pension supplement since he failed to cooperate with vocational rehabilitation.

It was unclear whether the benchmarks in the Rating Schedule for amputations were designed to include the sensitivity and tenderness of which the worker was complaining or whether they were designed to deal only with functional impairment. The pension rating was referred back to the Board. [9 pages]

DECISION NO. 144/90 (22/06/90) Lax McCombie Clarke

Continuity (of complaint).

The worker suffered back injuries in 1982 and 1983. The worker was entitled to benefits for a lay-off in 1986. There was continuity of complaint and the pain was always in the thoraco-lumbar area. [5 pages]

DECISION NO. 151/90 (22/06/90) McGrath McCombie Preston

Access to worker file, s. 77.

Access to the worker's file was granted to the employer. [4 pages]

DECISION NO. 150/90 (22/06/90) McGrath McCombie Preston

Access to worker file, s. 77.

Access to the worker's file was granted to the employer. [4 pages]

DECISION NO. 152/90 (22/06/90) McGrath McCombie Preston

Access to worker file, s. 77.

Access to the worker's file was granted to the employer. [3 pages]

DECISION NO. 362/90 (23/06/90) Chapnik McCombie Jago

Earnings basis (unemployment insurance benefits) - Earnings basis (period of unemployment).

The worker was employed as a long distance bus driver, but he only worked at peak periods during the year. From 1984 to 1987, the pattern of work was always the same. He would work three months during the summer, one month at Christmas and one month at Easter. For the remaining seven months of the year, the worker would receive unemployment insurance benefits.

In August 1987 the worker suffered a compensable accident. The issue was the appropriate calculation of the worker's earnings basis.

The worker's "daily or hourly" earnings on the date of the accident did not "fairly represent the average earnings", under s.43(1)(a), particularly since the worker was paid on a mileage basis.

As a clear pattern of employment had been established between the worker and the employer, the worker had "been employed" with that employer for some three years prior to the accident. Therefore, the test in s.43(1)(b), relating to a period of employment less than twelve months, was inapplicable. This was evidenced by the fact that the worker continued to accrue seniority during the periods of unemployment and thereby eventually became a full-time driver in 1988.

Section 43(2) was also inapplicable. None of the indicia of that section existed as there was no shortness of time, no casual nature to the employment and it was not impractical to calculate the worker's average earnings.

The only question thus became whether unemployment insurance benefits received by the worker during the twelve months preceding the accident should be included as part of his average earnings, under s.43(1)(b).

While generally there is a strong argument against including unemployment insurance benefits as earnings, on the specific facts of this case, they should be included. This was an extreme case where unemployment was a regular part of the employment cycle and the obligation to provide sufficient work to ensure that workers qualified for unemployment insurance benefits appeared to be an implied term of the employment contract.

There was a reasonable expectation that the Unemployment Insurance Commission would subsidize the worker's wages. Unemployment insurance benefits became part of his anticipated earnings. The Board was directed to include unemployment insurance benefits received by the worker in the twelve months preceding the accident, when determining his average earnings. [7 pages]

WCAT Decisions Considered: Decision No. 994/88 (1989), 12 W.C.A.T.R. 61

DECISION NO. 203/90 (26/06/90) Hartman Lebert Seguin

Delay (reporting injury).

A bricklayer was entitled to benefits for a back injury suffered when he slipped as he was climbing down scaffolding. On the evidence, the accident occurred as described by the worker. A delay of three or four days in reporting the injury was not significant in the circumstances. [6 pages]

DECISION NO. 397/90 (26/06/90) Bigras Robillard Barbeau

Access to worker file, s. 77.

Access to the worker's file was granted to the employer. [4 pages]

WCAT Decisions Considered: Decision No. 755/88 (1988), 10 W.C.A.T.R. 323

DECISION NO. 512/89 (26/06/90) Strachan McCombie Merritt

Chronic pain - Reflex sympathetic dystrophy - Procedure (witness fees).

The worker suffered a knee injury in 1972, for which he was awarded a pension. The worker claimed further entitlement in 1986.

In a preliminary matter, the Panel denied a request to allow witness fees for a doctor on a specialist fee scale. The doctor was not a qualified specialist and his testimony did not offer significant assistance beyond the explanations and opinions in his reports contained in the Case Description.

There was evidence of psychogenic pain and reflex sympathetic dystrophy. Applying the whole person concept, the Panel referred the matter to the Board for assessment to determine whether the worker's condition had deteriorated beyond his pension level. [10 pages]

DECISION NO. 279/90 (26/06/90) Starkman Lebert Preston*Medical examination (section 21).*

The worker was required to attend an examination which would assess the type of work of which he was capable. The examination was important to achieving a valid compensation goal. The worker thought that his doctor was advising against travelling from Wawa to Thunder Bay for the examination. However, the Panel contacted the doctor, who stated that the worker could travel for the examination. [4 pages]

DECISION NO. 440/90 (26/06/90) Starkman Beattie Nipshagen*Temporary disability (beyond pension level)*

A truck driver suffered a back injury in 1977, for which he was awarded a 25% pension. The worker was not entitled to benefits in 1984. On the evidence, his condition did not change. He was laid off by the employer in 1984, not because of his physical condition but because of a lack of work. [6 pages]

DECISION NO. 407/90 (27/06/90) Carlan Cook Jago*Access to worker file, s. 77 (issue in dispute).*

In a letter, the employer identified the following issues in dispute for the purpose of a s.77 appeal: SIEF relief to the costs of the claim, the payment of a 25% permanent disability award and the payment of temporary benefits beyond 30 days following the accident. At the hearing, the employer's representative advised that the temporary benefit issue was not really an issue in dispute, but rather a standard issue identified to insure access to the entire Board medical file.

The temporary benefit issue was not a valid issue in dispute. However, the other two issues were valid. The employer was entitled to access to the worker's file except for certain memos which were irrelevant to the issues in dispute. [3 pages]

DECISION NO. 462/90 (27/06/90) Carlan Cook Nipshagen*Access to worker file, s. 77.*

Access to the worker's file was granted to the employer. [3 pages]

DECISION NO. 408/90 (27/06/90) Carlan Rao Jago*Jurisdiction, Tribunal (section 77) - Procedure (absent parties).*

The Panel proceeded with a worker's appeal under s.77 in his absence. The worker had forgotten about the hearing but had adequate notice.

The employer was requesting that the worker's claim be allowed on an aggravation basis only. The s.77 appeal was premature since the Board had not made a decision yet in the case. [4 pages]

Board Directives and Guidelines: Operational Policy Manual, Document no. 01-04-11

DECISION NO. 844/89 (27/06/90) Moore Higson Preston

Delay (onset of symptoms) - Disc, herniated.

In March 1974, the worker fell a distance of 10 or 12 feet, landing on both heels and suffering a fracture of his left ankle and right tibia. He had casts on both legs, spent eight weeks in a wheelchair and three weeks on crutches. In October 1974, the worker was diagnosed as having a herniated disc.

The worker was not entitled to benefits for the herniated disc. Medical opinions stated that if the worker suffered the herniated disc in the accident, there would not have been a six month delay in onset of symptoms. [7 pages]

DECISION NO. 540/89 (27/06/90) Onen McCombie Apsey

Continuing entitlement.

The worker was not entitled to benefits for a low back disability after his lay-off from work in 1980. This condition was not caused by three compensable accidents in 1968 which were of a minor nature. In the interim, the worker was employed at jobs requiring physical exertion. There was a documented lack of complaint during the early 1970s.

Though some medication may have been prescribed for back pain, there was no medical explanation of these complaints, or of their causation. The worker had also made prior statements that his disability during the 1980s was caused by a compensable knee condition, for which he was already receiving a pension. [7 pages]

DECISION NO. 469/90 (27/06/90) Signoroni Drennan Jago

Access to worker file, s. 77.

Access to the worker's file was granted to the employer. [3 pages]

DECISION NO. 468/90 (27/06/90) Signoroni Drennan Jago

Access to worker file, s. 77.

Access to the worker's file was granted to the employer. [3 pages]

DECISION NO. 467/90 (27/06/90) Signoroni Drennan Jago

Access to worker file, s. 77.

Access to the worker's file was granted to the employer. [3 pages]

DECISION NO. 466/90 (27/06/90) Signoroni Drennan Jago

Access to worker file, s. 77.

Access to the worker's file was granted to the employer. [3 pages]

DECISION NO. 412/90I (27/06/90) Kenny Robillard Clarke

Access to worker file, s. 77 (harmful information).

Several medical reports were released to the worker with some sections blacked out, in accordance with s.77(2). Access to these reports was granted to the employer in the same form. The employer can then decide whether to apply for access to the deleted portions. If the employer does apply for access to the deleted portions, the Panel may consider giving access to the worker's representative so that she can make submissions.

A further report was released by a Board consultant only to the worker's family doctor. The Panel requested an opinion from the Board consultant as to whether the report should be released to the employer. [5 pages]

WCAT Decisions Considered: Decision No. 1174/87 (1988), 9 W.C.A.T.R. 192

DECISION NO. 217/90 (27/06/90) Kenny Lebert Howes

Hearing loss.

The worker appealed the denial of his claim for hearing loss benefits. From 1973 to 1984, he was a bricklayer for a stonework contractor. The worker stated that noise on the work sites came from the stone-splitting that he did (using a hammer and chisel) and from machinery (including trucks, compressor drills). However, he identified the main source of noise as being a portable, gas-powered cement mixer that had an exposed motor and ran continuously.

There were no sound surveys available for that particular mixer, but the evidence suggested that it would be at the lower range of cement mixer exposure levels for which information was available (possibly at about the 74 decibel range). Considering all the sources of noise identified by the worker it was highly unlikely that he was exposed to a noise level of a least 90 decibels per day, for five years, as required by Board policy.

The evidence indicated that middle ear disease and eustachian tube malfunction were the likely causes of the worker's hearing loss. The appeal was dismissed. [9 pages]

DECISION NO. 897/89 (28/06/90) Signoroni Felice Seguin

Schedule 1 employer - Class of employer (golf club).

The worker was a greenskeeper as a golf and country club. The worker appealed a decision of the Hearings Officer denying entitlement. The issue was whether the employer was included in Schedule 1.

Generally, the end product of a specific industry determines the classification of the industry for classification purposes. The employer's operations fell within the scope of a recreational association. The

greenskeeping and maintenance work done by the worker was complementary to the recreational activities of the association. However, those activities could not be assessed separately since they did not come within the exception in s.5(2)(b) of Reg. 951. There was no evidence that the greenskeeping work was carried on as a business or trade or for profit or gain. Further, there was no evidence of segregation of payroll.

Recreational associations were not included in Schedule 1 or 2. The appeal was dismissed. [9 pages]

Regulations Considered: Reg. 951, s.5(2)

WCAT Decisions Considered: Final Decision No. 417 (1986) 3 W.C.A.T.R. 154

DECISION NO. 420/90 (28/06/90) Hartman Higson Meslin

Hernia (inguinal) - Delay (reporting injury).

The worker and a co-worker were putting an 1,800 pound sizer roll into place when the worker told the co-worker he thought he had hurt himself. This task was normally performed by three persons rather than two.

The worker did not report the incident and continued working. Two days later, the worker felt a tingling sensation in his groin when he had to react quickly to catch the top of a lifting device that sprang open unexpectedly. The worker did not report that incident either, but sought treatment shortly after the end of that shift when he noticed a lump on his abdomen.

The worker was entitled to benefits for an inguinal hernia. Each of the two incidents was compatible with a sudden severe stress capable of precipitating the type of hernia sustained by the worker.

The worker's delay in reporting the work incidents to the employer, and his initial expressions of uncertainty to whether his condition was work-related, were consistent with a worker who did not wish to pursue a claim without first having a medical opinion supporting his position. They did not require the drawing of the inference that the worker was fabricating a work relationship. [7 pages]

DECISION NO. 429/90 (29/06/90) Faubert Robillard Nipshagen

Access to worker file, s. 77 (deletion of material).

Access to the worker's file was granted to the employer, except for some sensitive personal information whose probative value was outweighed by prejudice to the worker which would result from release of the information. [4 pages]

DECISION NO. 35/90 (29/06/90) Signoroni Robillard Ronson

Continuing entitlement.

The worker suffered a shoulder injury in November 1985. On the evidence, the worker suffered a recurrence in 1987 and was entitled to full benefits from April 1987 to March 1988 and to a pension thereafter. [6 pages]

DECISION NO. 330/90 (29/06/90) Faubert Beattie Jago

Supplements, temporary - Rehabilitation, vocational (cooperation) - Availability for employment (job search).

The worker suffered a back injury in 1980 for which he was awarded a 10% pension. The worker was not entitled to a temporary supplement from June 1985 to November 1985 or from June 1986 to August 1986. Rehabilitation services were discontinued due to failure to cooperate. The evidence did not satisfy the Panel that the worker made a sincere and determined effort to find employment. [9 pages]

DECISION NO. 637/89 (29/06/90) Faubert Beattie Apsey

Continuing entitlement.

The worker suffered a neck and head injury in March 1983. She received benefits for two weeks until she entered hospital for previously arranged gallbladder surgery.

On the preponderance of medical evidence, the Panel found that the worker suffered a soft tissue injury to her cervical spine in the compensable accident and that the injury never completely resolved. The worker was entitled to 50% temporary partial disability benefits until March 1984 and to a pension thereafter. [10 pages]

WCAT Decisions Considered: Final Decision No. 2 (1987), 4 W.C.A.T.R. 1; Decision Nos. 254, 484F

DECISION NO. 376/90 (29/06/90) Faubert Beattie Apsey

Temporary partial disability - Rehabilitation, vocational (cooperation).

The worker suffered a back and neck injury in May 1984. He appealed a decision of the Hearings Officer reducing benefits to 50% from June 1985 until March 1986, when he was awarded a 20% pension.

On the evidence, the worker had a significant disability during the period in question but was capable of performing some type of modified work. The worker was not disentitled from receiving full benefits. Considering his disability and work skills, the worker would have required extensive assistance and encouragement from his treating doctors and the Board in order to return to work. In the absence of such assistance, the Panel could not find that the worker failed to cooperate with rehabilitation. The appeal was allowed. [7 pages]

WCAT Decisions Considered: Decision No. 184/87 (1988), 8 W.C.A.T.R. 115

**DECISION NO. 391/90 (03/07/90) Onen Robillard Nipshagen
Sun Alliance Insurance Co. v. LaFontaine; Girard v. LaFontaine**

*Section 15 application (remoteness) - Jurisdiction, Tribunal (section 15) (initial entitlement) -
In the course of employment (personal activity) - In the course of employment (dual purpose test).*

The plaintiff was a foreman in a mine. A co-worker was a member of his drilling team. The foreman and co-worker were involved in a motor vehicle accident with a vehicle driven by another defendant. The foreman was a passenger in the vehicle driven by the co-worker. The vehicle was borrowed from the co-worker's father

and owned by the father's business. The plaintiff brought actions against the co-worker, the company that owned the vehicle, the insurer of that vehicle and the driver of the other vehicle. The insurer brought a s.15 application to determine whether the foreman was entitled to compensation. The co-worker and the father's company brought a s.15 application to determine whether the foreman's right of action was taken away.

The foreman's car had broken down. The co-worker was driving the foreman pursuant to an arrangement that had been worked out between them. The accident occurred after completion of a shift. They were proceeding to the shop so that the foreman could pick up an expense cheque and some burlap, which was used in the drilling operation.

The co-worker was not in the course of employment. The predominant nature of the co-worker's trip to the shop was to do a personal favour. The right of action against the co-worker was not taken away.

The foreman was in the course of employment. Picking up the expense cheque would not have been sufficient to place him within the course of employment. However, he also had the secondary purpose of picking up burlap, which he intended to cut at home in order to maximize drilling time. There was incentive for the foreman to maximize drilling time. The foreman was expected to perform some duties outside shift hours and he received a car allowance, gas and extra pay for these duties. The foreman suffered a personal injury accident which arose out of and in the course of employment. He was entitled to compensation.

The Tribunal did not have jurisdiction regarding the action against the company owning the vehicle. Its employees were not involved in the accident. [13 pages]

WCAT Decisions Considered: 993/88

DECISION NO. 154/90 (29/06/90) Signoroni Fox Ronson

Supplements, temporary (rehabilitative purpose) - Supplements, temporary (wage loss).

The worker was a set-up operator who suffered a compensable injury in 1981. He was awarded a pension in March 1986. At that time he was employed as a janitor at a wage loss. He received a temporary wage loss supplement from March 1986 to May 1988.

The worker was not entitled to a supplement from May 1988 to July 1989 since there was no rehabilitative purpose to justify an extension. Vocational rehabilitation assistance was not appropriate, considering his age, education, language difficulties and long history with the accident employer. By May 1988, he had been in his janitorial job for more than three years and could not be considered still to be in an adjustment phase. [6 pages]

WCAT Decisions Considered: Decision No. 466/89 (1989), 11 W.C.A.T.R. 369

Board Directives and Guidelines: Policy of Supplementary Benefits under s.45(5) of the Act, Board Minute 1(a), November 16, 1987, p.52; Addendum to s.45(5) Policy, December 3, 1987

DECISION NO. 374/90 (29/06/90) Faubert Beattie Apsey

Commutation (debt liquidation).

The worker appealed a decision of the Hearings Officer denying commutation of his pension, valued at about \$12,000, for the purpose of debt liquidation. The worker had a monthly deficit of about \$1,200. The commutation would reduce the deficit to about \$850 monthly.

Although the commutation might be in the worker's short term interest, it would not be in his long term best interest. The worker had a pattern of financial difficulty since 1980. The commutation would still

leave the worker with a large monthly deficit and, given the worker's debt history, would inevitably lead to more loans to finance his expenses. Even though the monthly pension of \$66 was insignificant as compared to the worker's debt, it was not in the worker's long term interests to grant the commutation. [9 pages]

WCAT Decisions Considered: 29/89

Board Directives and Guidelines: Guidelines for the Commutation of Pensions, Board Minute #3, March 20, 1989, p.71

DECISION NO. 862/89L (28/06/90) Signoroni Fox Seguin

Leave to appeal (good reason to doubt correctness) (evidence to support Appeal Board conclusion) - Medical opinion (bronchial spasm) - Silicosis.

The worker's spouse applied for leave to appeal a decision of the Appeal Board which held that the worker's silicosis was not a significant contributing factor to his death.

The worker apparently died of a subdural hematoma caused by hitting his head upon falling. One medical opinion stated that the fall was caused by bronchial spasm brought on by sudden exposure to wind and cold, but that this alone would be unlikely to cause death unless the lung was also compromised by some other disease. It concluded that the worker's silicotuberculosis played a 20% part in his death.

A second medical opinion, which was also supported by a third doctor, concluded that in the unlikely event that cold caused dangerous bronchospasm, the worker's silicosis increased neither the risk of developing bronchospasm, nor its danger. This report concluded that the worker's high blood alcohol level at the time of death probably explained the accident.

The Appeal Board indicated that the first medical opinion was based on erroneous information. The Appeal Board also emphasized the worker's blood alcohol level, a factor not addressed by the first medical opinion. There was sufficient evidence to reach the decision rendered. There was not good reason to doubt the correctness of the Appeal Board's decisions. The application was dismissed. [9 pages]

DECISION NO. 55/90 (28/06/90) Signoroni Drennan Shuel

Continuity (of complaint) - Jurisdiction, Tribunal (final decision of Board)

(decision of Ombudsman Administrator) - Jurisdiction, Tribunal (leave to appeal) - Ombudsman.

A letter, from the Board's Ombudsman Administrator to the Ombudsman, that essentially confirmed the position of the Appeal Board by providing new arguments, constituted a final decision by the Board. The worker was entitled to appeal that decision as of right and thus did not require leave to appeal the Appeal Board's decision. The Ombudsman Administrator had re-opened the case by conducting an extensive investigation and seeking further medical evidence.

The worker received benefits for a fractured clavicle suffered in August 1969 when the opposite end of a 500 pound pipe that he was supporting on his shoulder suddenly fell. Benefits were terminated in October 1969. Attempts to establish benefits for continuing neck pain were unsuccessful.

The worker complained of neck pain six days after the 1969 accident and even was advised to wear a neck collar at the time. During the early 1970s the worker turned to a lifestyle as a skid-row alcoholic which was not conducive to his neck injuries being further reported or treated. In the late 1970s the worker returned to a mainstream lifestyle and the existence of cervical disc disease from that point was clearly established. In the early 1980s the worker unsuccessfully renewed his efforts to establish an expansion of his original entitlement to include a neck condition.

Medical reports, on balance, tended to support a causal relationship between the neck condition and the 1969 accident. The worker was entitled to a pension retroactive to the date of the accident. [10 pages]

WCAT Decisions Considered: Decision Nos. 669/87L, 258/88

DECISION NO. 246/90L (03/07/90) Lax McCombie Clarke

Leave to appeal (good reason to doubt correctness) (evidence to support Appeal Board conclusion).

The Appeal Board denied entitlement for a psychiatric disability. There was a medical report that could have supported entitlement on an aggravation basis. The Appeal Board considered that evidence as well as the other evidence before it. There was evidence to support the Appeal Board conclusion.

Leave to appeal was denied. [5 pages]

WCAT Decisions Considered: Decision No. 131 (1986), 2 W.C.A.T.R. 77

DECISION NO. 475/90 (03/07/90) Starkman Fox Jago

Suitable employment.

The worker suffered a left arm injury in April 1987 and returned to modified work in October 1987. He laid off in December 1987.

The worker was not entitled to benefits subsequent to December 1987. He was doing modified work as an inspector of car seats. On the evidence, this work did not require the worker to tilt the seats backwards in the majority of cases and it did not require the worker to remove seats from the conveyor line. The Panel found that the worker refused suitable available work. [8 pages]

DECISION NO. 455/90 (03/07/90) Signoroni Lebert Shuel

Suitable employment - Employment (resignation).

The worker suffered a knee injury in 1979, for which he was awarded a pension. He returned to work in 1983 with a new employer. He resigned in December 1987 after conflicts with his supervisor over the amount of time he took off due to his knee problems. The Board granted 50% benefits from December 1987 to September 1988. Full benefits were restored in September 1988 when the worker underwent knee surgery.

The Panel found that the worker's condition gradually deteriorated and that he was unable to keep up with an increased amount of walking that was required in his job. Therefore, the job gradually became unsuitable. The worker was entitled to full partial disability benefits from December 1987 to May 1988 since he was partially disabled and looking for work as best as could be expected considering his condition. From May 1988 to September 1988, he was totally disabled. [6 pages]

DECISION NO. 447/90 (04/07/90) Signoroni McCombie Meslin

Death (maintenance of claim by estate) (commutation).

After learning that he had non-compensable terminal cancer, the worker applied for commutation of his pension for the purpose of meeting future education costs of his children. The application was dismissed by the Hearings Officer. The worker's spouse appealed on behalf of the worker's estate.

The Panel agreed with Decision No. 694 that it is not reasonable to consider a commutation request on the basis of the circumstances as they existed at the time of the request only.

The Panel agreed with the Hearings Officer that the request was purely financial in nature and did not comply with the requirements of Board policy. Alternatively, the estate is only entitled to benefits which accrued prior to the worker's death. In this case, the pension terminated on the death of the worker. The appeal was dismissed. [6 pages]

WCAT Decisions Considered: 694

**DECISION NO. 73/90 (04/07/90) Chapnik McCombie Preston
Miller v. Comeau**

Section 15 application (economic loss) - Section 15 application (property damage) - Transportation industry (truck driver).

The plaintiff worker was the owner/driver of a truck involved in a motor vehicle accident. The worker brought an action claiming damages for loss of use of the vehicle.

Pursuant to s.8(9), a worker cannot bring an action for an injury for which benefits are payable under the Act. The Panel agreed with Decision No. 675/88 that the Act does not bar automatically an action for property damage. The Panel also agreed with Decision No. 432/88 that it would be artificial to fragment actions in any one matter.

In determining whether a worker suffered an injury for which benefits were payable under the Act, the Panel considered the following criteria: whether the owner and driver were the same party; whether the worker alleged personal injury from the same accident and whether time off for such personal injury coincided with the loss of use claim; whether a third party claim was involved; whether an alternate remedy under the Act was available; whether any additional payment would be in excess of expenses incurred; whether the property claim was independent of the personal injury claim.

In this case: the worker suffered a personal injury for which benefits were payable under the Act; the owner and driver were the same; the time off work coincided with personal injury claim; no third party claim was involved; the economic loss claim was an integral part of the personal injury claim, which was barred. Accordingly, the Panel concluded that the economic loss claim was barred. [12 pages]

WCAT Decisions Considered: Decision No. 965/87 (1988), 8 W.C.A.T.R. 214; Decision No. 432/88 (1988), 9 W.C.A.T.R. 306; Decision Nos. 675/88, 872/88, 170/90

Board Directives and Guidelines: Claims Adjudication Branch Procedures Manual, Document no. 33-08-09; Operational Policy Manual, Document no. 05-02-02

Cases Considered: Genereux v. Peterson Howell & Heather (Canada) Ltd., [1973] 2 O.R. 558; Racicot v. Saunders (1979), 103 D.L.R. (3d) 567; Meyer v. WCB (1986), 15 O.A.C. 202

DECISION NO. 290/90 (04/07/90) Signoroni Ferrari Meslin
Celentano et al. v. Likos

*Section 15 application - In the course of employment (proceeding to and from work) -
In the course of employment (benefit to the employer).*

The plaintiff was injured in a motor vehicle collision while he was being driven to a job site. The employer operated out of a yard to which workers reported before going to the various job sites, except for when they were picked up from home by the employer and driven directly to the job site, as in this instance. On occasion, the worker travelled directly to the job site by public transportation.

The job site in question was out of town and thus was not easily reached by public transportation. The worker did not drive. The worker's home was on the way from the yard to the job site. The worker was a member of a team and performance of the work required input from all members. Gathering all the team members before travelling to the job site was thus an efficient method of running the employer's paving business. This practice constituted a benefit to the employer which outweighed the cost saving and convenience that the worker derived from the transportation.

The collision was an accident arising out of and in the course of employment, even though the worker was not paid until he reached the job site. The worker's right of action was taken away. [9 pages]

DECISION NO. 69/90 (03/07/90) Carlan Beattie Preston

Chronic pain.

The worker, then aged 68, suffered broken ribs when he fell backwards from a ladder in September 1985. Despite his efforts to keep working through the injury, the worker was forced to lay off permanently in January 1986 because of ongoing pain in his shoulders and chest. The Panel found that he was a sincere and hardworking individual who would have continued to work as long as possible, despite being beyond the normal retirement age.

The medical evidence failed to disclose any organic source for the worker's continuing pain in the areas affected by the work injuries, but it also ruled out a possible cardiac condition as a cause of the pain. The worker became depressed after the accident and was unable to carry out his normal activities or work. The worker was entitled to benefits for a chronic pain disorder which had resulted in a marked life disruption. [5 pages]

DECISION NO. 805/89 (04/07/90) Starkman Beattie Apsey

Pensions (assessment) (back).

The employer appealed a decision of the Hearings Officer confirming a 60% pension for the worker's back disability. The worker suffered the back injury in 1966 and was awarded a 10% pension in 1969, later increased to 20% in 1975, to 30% in 1980, to 35% in 1984 and to 60% in 1987.

The 60% award was based on a pension assessment that the worker had a failed back after multiple unsuccessful operations. The Panel found that this assessment was anomalous. All other examinations were fairly consistent and indicated that the worker did not have total immobility of the lumbar or lumbosacral spine, permanent neurological deficit or muscle wasting. Considering the physical findings relative to the Rating Schedule, the Panel found that the worker was entitled to a 35% pension. [19 pages]

DECISION NO. 31/90 (04/07/90) Signoroni Cook Jago*Delay (onset of symptoms).*

The worker was not entitled to benefits for a neck and shoulder condition on an organic basis. She claimed that she began to experience symptoms immediately after returning to work, in October 1985, from a compensable low back injury. However, there was no documented reference to neck and shoulder pain until September 1986. The diagnosis of the worker's condition was uncertain. The symptoms may have surfaced while the worker was at home. There were some comments about the psychological nature of the symptoms. However, this appeal was limited to a claim on an organic basis. [8 pages]

DECISION NO. 38/90 (04/07/90) Signoroni Klym Ronson*Suitable employment.*

The worker suffered a low back injury in 1983. After a number of recurrences, the worker attempted to return to work in October 1987. On the evidence, the work offered to the worker in October 1977 was not suitable. The matter was referred back to the Board to determine the nature and extent of further benefits. [7 pages]

DECISION NO. 852/89 (05/07/90) Stewart (dissenting) Heard Jago*Delay (onset of symptoms).*

The worker suffered overuse injuries to his elbow and shoulder from his work using an air gun with an automobile manufacturer in May 1986.

The majority of the Panel found that the worker was not entitled to continuing benefits subsequent to January 1987. Any ongoing disability was related to the worker's neck rather than his shoulder/elbow. The cervical condition was not related to employment, considering delay in onset of symptoms for four months.

The Panel Chairman, dissenting, found that the worker experienced neck pain shortly after the accident, although he did not complain about it for four months. [12 pages]

DECISION NO. 451/90 (05/07/90) Signoroni McCombie Meslin*Accident (occurrence).*

The worker underwent a cervical fusion at C5-6 in 1985. She claimed that it was related to an unreported work accident in 1980. The Panel found that the worker did not suffer a cervical injury at work in 1980, considering the lack of reporting and the delay in obtaining medical attention until 1983. [6 pages]

DECISION NO. 389/90 (05/07/90) Chapnik Fox Barbeau*Access to worker file, s. 77 (issue in dispute) (vocational rehabilitation).*

Access to the worker's file was denied to the employer. The worker had suffered an injury in 1973 for

which he was awarded a 40% pension in 1989. The employer was concerned with the Board's decision in 1987 to deny further vocational rehabilitation assistance to the worker. This decision was clearly a decision in the employer's favour. There was no valid issue in dispute. [4 pages]

DECISION NO. 327/90 (05/07/90) Moore Ferrari Meslin
Liuzzi v. Grassa

Section 15 application.

The plaintiff advised that he intended to withdraw his claim against the owner and driver of the vehicle in which he was a passenger at the time of a motor vehicle accident. On consent, the Panel found that the right of action against those defendants was taken away. [5 pages]

DECISION NO. 808/87 (05/07/90) Kenny Lebert Gabinet

Continuing entitlement - Pensions (assessment) (thigh).

The worker suffered a thigh injury in 1982 when he was pinned against machinery. The employer appealed a decision of the Appeals Adjudicator granting full temporary benefits from June 1984 to October 1984 and granting a 10% pension.

The worker continued to complain of pain, numbness, weakness and tenderness. There was considerable difference of opinion in the medical reports as to whether the worker had a significant disability. The reports agreed that there was a visible indentation in the thigh. Some doctors felt that this was only a cosmetic change. Others felt that there was a soft tissue defect.

On the evidence, the Panel found that the worker was still unable to perform his regular job in June 1984. He was entitled to full benefits until October 1984.

Although some reports indicated that the worker's pain was greater than would be expected from the organic findings, the Panel was satisfied that there was sufficient evidence to justify the 10% pension. Considering the mechanics of the accident, there was a solid basis for the opinion that the worker suffered a rather severe ligamentous strain.

The appeal was dismissed. [9 pages]

DECISION NO. 387/90L (04/07/90) Hartman Ferrari Preston

Leave to appeal (good reason to doubt correctness) (consideration of evidence).

The worker was granted leave to appeal a decision of the Appeal Board which concluded that the worker was not exposed to hazardous noise of sufficient severity to cause her hearing problems.

The fact that others in the worker's department received hearing loss pensions was not of itself good reason to doubt the correctness of the Appeal Board decision. However, the Appeal Board's reasons were so unclear that the Panel was left to assume or guess the basis of its decision. Given the silence and or conflicts in the written materials on key points such as diagnosis, compatibility, actual work history and actual exposure the Panel could not safely assume anything.

As the Appeal Board was purportedly applying the particular criteria of exposure and duration to decide about the hearing loss, there was good reason to doubt the correctness of the Appeal Board decision when the determination of the exposure, duration and hearing loss was not discernible. The Appeal Board also appeared

to say that the worker had a type of hearing loss which was not compatible with noise exposure when there was no medical information apparently before it to arrive at that conclusion. Finally, the Appeal Board denied the claim on the basis of "measurable noise levels" without setting out which levels it accepted or rejected. [6 pages]

DECISION NO. 491/90 (04/07/90) Signoroni Drennan Preston

Accident (occurrence):

The worker claimed to have injured his back while performing heavy work on a Saturday. The next Monday, shortly after reporting to work, he had an argument with the foreman which ultimately led to the worker being suspended for a few weeks. On the employer's suggestion, the worker claimed sickness benefits. The worker confirmed that the sickness benefits were likely paid on a psychological basis because of his behaviour after the argument. The worker took the position that he was fully recovered on the same date that he was allowed to resume work after the suspension.

Considering the worker's failure to report the injury to anyone despite the presence of four co-workers, his failure to get medical treatment until after the argument which led to the suspension and that the family doctor did not consider the worker disabled from performing his usual work, the Panel found the worker's claim to be without merit. [4 pages]

DECISION NO. 283/90 (05/07/90) Moore Higson Seguin

Medical examination (section 21) (selection by employer) - Merits and justice.

The employer applied for an order requiring the worker to attend a medical examination by an orthopaedic surgeon. The employer wanted an opinion whether the worker was presently disabled, whether the disability was consistent with the worker's version of events and whether any preexisting injury contributed to the disability.

The employer had applied for access to the worker's file but had been only partially successful. There was a valid compensation goal. However, better evidence was available to enable the employer to achieve its compensation goals. The worker had been examined by two orthopaedic specialists and the worker was prepared to consent to preparation of a report by them. This approach was a reasonable alternative to the requested examination and best balanced the competing interests of the parties.

The provision in s.21(2) that the Tribunal may make such further order as may be just, suggests that the Tribunal had the power to fashion equitable remedies analogous to the general duty to decide the real merits and justice of the case.

The Panel directed the Tribunal Counsel Office to forward a copy of the employer's letter, outlining the issues on which it required an opinion, to the worker's specialists and to obtain a report from them. [5 pages]

WCAT Decisions Considered: Decision No. 174 (1986), 2 W.C.A.T.R. 96; Decision Nos. 19/87, 831/87I, 656/88

DECISION NO. 432/90 (05/07/90) Bigras McCombie Nipshagen

Disablement (strenuous work) - Hernia (inguinal).

A fork lift operator was entitled to benefits for an inguinal hernia. The hernia was related to the strain of operating the brake on the fork lift, particularly when it had a full load. [5 pages]

Board Directives and Guidelines: Operational Policy Manual, Document no. 03-03-15

DECISION NO. 388/90 (06/07/90) Chapnik Fox Barbeau

Access to worker file, s. 77 (deletion of material).

Access to the worker's file was granted to the employer, except for one sensitive comment, which was only marginally relevant but which could be prejudicial to the worker. [4 pages]

DECISION NO. 430/90 (06/07/90) Faubert Robillard Nipshagen

Access to worker file, s. 77.

Access to the worker's file was granted to the employer. [3 pages]

DECISION NO. 365/90 (06/07/90) Hartman Rao Barbeau

Access to worker file, s. 77.

Access to the worker's file was granted to the employer, except for one clearly irrelevant document. [3 pages]

DECISION NO. 366/90 (06/07/90) Hartman Rao Barbeau

Access to worker file, s. 77.

Access to the worker's file was granted to the employer. [3 pages]

DECISION NO. 367/90 (06/07/90) Hartman Rao Barbeau

Access to worker file, s. 77.

Access to the worker's file was granted to the employer. [3 pages]

DECISION NO. 206/90 (06/07/90) Chapnik McCombie Meslin

Aggravation (preexisting condition) (cyst) (pilonidal) - Cyst (pilonidal) - Transportation industry (truck driver).

A truck driver appealed a decision of the Hearings Officer denying entitlement for aggravation of a preexisting pilonidal cyst.

The worker claimed that the aggravation occurred when he was driving over a bumpy road. However, the evidence did not establish that such an accident occurred. Further, it was not established that the nature of the worker's work was a significant contributing factor to the aggravation. The aggravation probably resulted from a reduction in personal cleanliness or a hot sweaty environment.

The appeal was dismissed. [7 pages]

WCAT Decisions Considered: 1033/87

DECISION NO. 1025/89 (09/07/90) Strachan (dissenting) Cook Nipshagen Lanno v. Simcoe & Erie General Insurance Co.

Section 15 application - Jurisdiction, Tribunal (section 15) (initial entitlement) - In the course of employment (proceeding to and from work) - In the course of employment (benefit to employer).

The plaintiffs were returning home from the job site in the company truck after completion of work, when they were involved in a motor vehicle accident. The plaintiffs' home was also the head office of the company business, which was owned by their father. The plaintiffs were not paid for travelling time. The plaintiffs brought an action against the insurer of the vehicle for no-fault benefits.

There was nothing in the Act which would take away the right of action of an insured against his insurer. However, the Panel decided that it would determine whether the plaintiffs had a right to claim compensation. The Panel had some concerns that it was being asked to determine this issue for the purpose of determining the plaintiffs' rights under the Insurance Act. However, there was a sufficient compensation nexus in this case.

On the merits, the majority of the Panel found that the plaintiffs were in the course of employment at the time of the accident. They were travelling home in a company-owned vehicle which they regularly used to transport themselves and tools of their trade to job sites. The use of the company-owned truck afforded a substantial benefit to the employer. They were entitled to claim compensation benefits.

The Panel Chairman, dissenting, found that the employment-related features were peripheral and that the predominant character of the activity was personal in nature. The tools that were transported in the truck were not large and did not necessitate the use of a truck. [12 pages]

WCAT Decisions Considered: 105/89

Other Statutes Considered: Insurance Act, R.S.O. 1980 c.218, Schedule C

Cases Considered: Decision No. 2 (1973), 1 B.C.W.C.R. 7; Madill v. Chu, 71 D.L.R. (3d) 295

DECISION NO. 654/89 (05/07/90) Carlan McCombie Preston

Pensions (assessment) (intercostal neuralgia) - Pensions (AMA Guides) (intercostal neuralgia).

The worker suffered a back injury in December 1976 and did not work since. Her activities were severely

limited and she suffered severe bouts of pain from apparently insignificant events, including hospitalization for a friendly pat on the back.

The worker's condition was diagnosed as intercostal neuralgia, which is severe pain that runs along the length of the nerves between the ribs. The Rating Schedule contained no useful benchmark for this condition.

The AMA Guidelines suggested a 3% rating. Considering Decision No. 817 and the severe limitations experienced by the worker, the pension was confirmed at 10%. This award was limited to organic disability only. [6 pages]

WCAT Decisions Considered: Decision No. 817

DECISION NO. 252/89L (06/07/90) McGrath Robillard Jago

Leave to appeal (good reason to doubt correctness) (consideration of evidence) - Leave to appeal (substantial new evidence) (medical report).

The employer sought leave to appeal a decision of the Appeal Board which denied SIEF relief. The worker suffered work accidents in 1974, 1975 and 1976. At the end of the hearing before it, the Appeal Board directed that a Board doctor review all x-rays, noting particularly findings following 1976 x-rays which made reference to spina bifida occulta. The Appeal Board concluded that spina bifida occulta was present in a limited degree, but was of doubtful significance.

Evidence adduced by the employer, relating to progression of degenerative disc disease, was not new. A report, that was relied on by the Appeal Board, specifically dealt with the degeneration process, but did not deem it significant in prolonging the worker's condition after the 1976 accident.

The doctor who reviewed the x-rays did limit his investigation to two sets of x-rays, but they dealt with the particular point on which the Appeal Board wanted clarification. The Appeal Board did not conclude that spina bifida occulta was the only underlying condition relevant to the issue. It found that the underlying degenerative condition was not significant in prolonging the worker's condition. The Appeal Board did not restrict its review of the evidence to a single x-ray report. It considered all the evidence and concluded that the prolonged rehabilitation after the 1976 accident was due to the nature of the accident itself.

Leave to appeal was denied. [8 pages]

WCAT Decisions Considered: Decision No. 64 (1986), 2 W.C.A.T.R. 19

DECISION NO. 480/90 (10/07/90) Kenny Cook Seguin

Temporary disability (beyond pension level).

The worker suffered a fractured tibia and fibula in 1964. A metal plate was placed in the leg to hold the bone in place. He was awarded a 10% pension. The worker underwent several further operations, including surgery in 1974 to take out the metal plate and surgery in June 1987 to remove remaining screws.

The Panel found that the worker's leg pain increased gradually in the period leading up to his lay-off in April 1986. By that time the leg was painful and very sensitive to any pressure. This increased pain prevented him from doing his regular job. The worker was temporarily disabled from April 1986 to June 1987 and was entitled to full benefits. [8 pages]

DECISION NO. 181/90 (10/07/90) Marcotte Lebert Nipshagen*Continuing entitlement.*

A telephone installer and repairman suffered a fractured finger in February 1987. The Board discontinued benefits in February 1988.

It was established on the preponderance of medical evidence that the worker continued to be partially disabled from sensitivity and limited flexion of the finger. The worker was totally disabled in June 1988 as a result of a non-compensable motor vehicle accident. The worker was entitled to partial disability benefits from February 1988 to June 1988. [8 pages]

DECISION NO. 380/90 (10/07/90) Chapnik Cook Jago*Access to worker file, s. 77.*

Access to the worker's file was granted to the employer. [3 pages]

DECISION NO. 378/90 (10/07/90) Chapnik Cook Jago*Access to worker file, s. 77.*

Access to the worker's file was granted to the employer. [3 pages]

DECISION NO. 379/90 (10/07/90) Chapnik Cook Jago*Access to worker file, s. 77.*

Access to the worker's file was granted to the employer. [3 pages]

DECISION NO. 882/87 (10/07/90) Bradbury Heard Ronson*Suitable employment (seniority) - Available employment (offer from accident employer) - Availability for employment (job search) - Collective agreement.*

A sealer/stower suffered a wrist injury in 1981. The Board denied benefits subsequent to February 1982 on the basis that the worker refused suitable available work.

The accident employer offered modified work as a crossing watchman, which the worker refused for a number of reasons including loss of his 26 years of seniority. The Panel found the collective agreement unclear but subject to an interpretation in which the worker would have lost his seniority had he accepted the job as a crossing watchman. On this basis, the Panel found that the job as a crossing watchman was not suitable.

The employer did not offer any other jobs to the worker. The worker did apply for some posted jobs. There were some other posted jobs for which he could have applied but did not on the basis of past experience

and a certain amount of hostility in the workplace. Nonetheless the worker made serious attempts to find modified work and exercised the right to bump junior employees when that right became available to him. The worker was entitled to full benefits from February 1982 to May 1982. [10 pages]

WCAT Decisions Considered: Decision No. 539/89 (1989), 12 W.C.A.T.R. 208; Decision Nos. 1042/87, 585/88

DECISION NO. 197/90 (10/07/90) Starkman McCombie Jago (dissenting)

Accident (occurrence) - Presumptions (section 3).

The employer appealed a decision of the Hearings Officer granting benefits for a back injury. The worker was a machine operator who claimed that she suffered a back strain when she fell while pulling on product that was stuck in a machine. The file contained testimony from other witnesses that the product did not stick in the machine. The employer submitted that the worker, who was pregnant, fainted.

The majority of the Panel was unable to conclude whether the product stuck to the machine. However, it was not necessary to make that determination. The worker fell in the course of employment. The presumption in s.3(3) applied in this case where the cause of the worker's fall was not known. There was no evidence, either direct or indirect, that the worker did in fact faint. There was insufficient evidence to rebut the presumption. The worker was entitled to benefits. The appeal was dismissed.

The Employer Member, dissenting, found that there was evidence that the product did not stick and that the accident did not happen as described by the worker. The presumption was not applicable in this case. [7 pages]

DECISION NO. 425/90 (10/07/90) Bradbury Lebert Jago

Temporary disability (beyond pension level) - Disability (disabled from working) (doctor's recommendation).

The employer appealed a decision of the Hearings Officer granting benefits from June 1987 to March 1988. The worker injured his thoracic spine in 1982 and was awarded a 10% pension. He laid off in June 1987, claiming increased back pain.

Comparing the limitation of flexion and extension at the time of the pension assessment and in 1987, the Panel found that the worker's condition did not deteriorate beyond his pension level. The worker submitted that he laid off in 1987 on the advice of his doctor. He saw the doctor once in June and once in July. He did not discuss returning to work with the doctor. In these circumstances, the Panel found that the worker could not rely on the doctor's recommendation in the first month of lay-off as a basis for being totally disabled and unable to work for a nine month period.

The appeal was allowed. [9 pages]

**DECISION NO. 295/90 (10/07/90) Moore Klym Preston
Marjadsingh v. Ruberto**

Section 15 application - In the course of employment (travelling) - Jurisdiction, Tribunal (section 15) (dependants).

The plaintiff was involved in a motor vehicle accident while driving in his own vehicle from a job site to the employer's premises, where he was going to continue working. The plaintiff was in the course of

employment. The defendant delivered auto parts. He was driving back to his employer's premises after making a delivery when involved in the accident. He was also in the course of employment. The plaintiff's right of action against the defendant driver was taken away.

The right of action against the owner of the defendant driver's vehicle was not taken away. However, the right of recovery was limited by s.8(11).

The Tribunal did not have jurisdiction regarding the action of the plaintiff's dependants since the plaintiff was alive and, accordingly, they were not dependants within the meaning of the Act. [10 pages]

WCAT Decisions Considered: 816/87, 8/90

Cases Considered: Lewis v. Low, 45 O.R. (2d) 436

DECISION NO. 29/90 (10/07/90) Signoroni Cook Jago

Continuity (of treatment).

The worker fell from a boxcar in April 1966 and returned to work in June 1966. The worker was not entitled to benefits for a low back condition in 1986, considering lack of continuity of treatment. The worker's condition was likely caused by degenerative changes. [5 pages]

DECISION NO. 492/88 (10/07/90) Strachan Beattie Apsey

Delay (onset of symptoms) - Continuing entitlement - Pensions (assessment) (back) - Temporary disability (beyond pension level).

The worker suffered a compensable shoulder and back injury in 1965. He was awarded a 10% pension for the back disability in 1967, later increased to 15% and then to 20%. In November 1986, he was awarded a three year provisional pension for psychiatric disability.

The worker was not entitled to benefits for a knee disability, considering delay in onset of symptoms until 1981. The worker was also not entitled to continuing benefits for his shoulder. On the evidence, there was no residual shoulder disability.

The 20% pension for the worker's back adequately recognized the worker's organic back disability. In considering whether the worker was disabled beyond his pension level subsequent to February 1984, the Panel considered the whole person concept. The worker's psychological condition was deteriorating during this period. The Panel found that the worker was disabled beyond his pension level from January 1985 until the provisional pension was awarded in November 1986. [10 pages]

**DECISION NO. 291/90 (12/07/90) O'neil Drennan Clarke
Canadian Oxygen Ltd. v. Silveira and Four Other Actions**

Section 15 application - In the course of employment (proceeding to and from work) - Jurisdiction, Tribunal (section 15) (dependants).

A foreman picked up other workers at their homes in a company truck and drove them to the yard. From there, they were dispatched to the job site. While driving from the yard to the job site, they were involved in a motor vehicle accident. The workers were not paid for the travelling time.

The Panel found that the foreman and the workers were in the course of employment at the time of the

accident. They had entered the sphere of employment. They were riding in a vehicle provided by the employer and were subject to a method of transportation that was generally within the control of the employer. This mode of transportation may not have been a condition of employment but was certainly the preferred practice of the employer and was considered by the workers to be part of their employment arrangement.

The accident arose out of and in the course of employment. the right of action of the foreman, the workers and the employer was taken away. The Tribunal did not have jurisdiction regarding the action of the dependants of the plaintiffs. [15 pages]

WCAT Decisions Considered: Decision No. 215 (1987), 4 W.C.A.T.R. 105; Decision No. 414

Other Statutes Considered: Family Law Act, 1986, S.O. 1986 c.4, s.61

Cases Considered: Meyer v. W.C.B. (March 25, 1988, unrep.) (Ont. C.A.)

DECISION NO. 473/90 (12/07/90) Carlan Cook Seguin

Supplements, temporary (rehabilitative purpose).

The worker suffered a low back injury in 1975 for which he was receiving a 20% pension. His job was terminated in 1982 for reasons unrelated to the accident. He tried unsuccessfully to obtain a new job. In 1986, he started his own business. He received a supplement from 1986 to 1988.

The worker was not entitled to continuation of his supplement. The business had been operating for two years but it never really got off the ground. There was no reasonable expectation that the business income would increase significantly. In addition, the worker was not willing to pursue other rehabilitation options. There was no rehabilitative purpose to be served by continuing the supplement. [4 pages]

DECISION NO. 422/89 (12/07/90) Faubert Cook Nipshagen

Continuing entitlement - Aggravation (preexisting condition) (disc, degeneration).

The worker suffered a compensable back injury in October 1980 and received benefits until May 1981. The worker was not entitled to benefits subsequent to May 1981. The worker had an underlying degenerative condition dating back prior to a previous compensable injury in 1973. On the evidence, the worker's condition had returned to its pre-accident state by the time benefits were terminated in May 1981. [9 pages]

DECISION NO. 598/88L (12/07/90) Strachan Heard Mason

Leave to appeal (substantial new evidence) (medical report) - Jurisdiction, Tribunal (leave to appeal) - Chronic pain.

The Appeal Board denied continuing benefits for a back injury. New medical reports did not constitute substantial new evidence since they were similar to earlier reports. However, the reports appeared to support a continuity of complaint and treatment that was in accord with the Board's chronic pain policy.

Leave to appeal was denied. However, leave was not required on the chronic pain issue. The Board was directed to review the file pursuant to its chronic pain policy. [6 pages]

DECISION NO. 381/90 (13/07/90) Chapnik Cook Jago

Access to worker file, s. 77 (deletion of material).

Access to the worker's file was granted to the employer, except for two reports. Although somewhat relevant to the issue in dispute, the personal aspects of those two reports outweighed their probative value. [4 pages]

DECISION NO. 303/90 (13/07/90) Starkman Fox Ronson

Earnings basis (permanent disability) - Earnings basis (short or casual employment) - Board Directives and Guidelines (earnings basis) (permanent disability) - Employment (seasonal) - Construction.

The worker appealed a decision of the Hearings Officer regarding the earnings basis for calculation of his pension. The worker was a construction labourer who suffered an injury in November 1980, for which he was awarded a pension in 1982. He had been a labourer from 1975 until 1978, when he opened a restaurant. In 1980, he began to work as an insulation salesman. In October 1980, he found construction work, through his union, with the accident employer. The job would have lasted for about three months.

The worker had been employed for the employer for only a short period at the time of the accident. If he had been employed for an entire year in the construction industry, his earnings basis would have been his actual earnings. The Board was unable to obtain comparative earnings from the employer or from the union.

The Panel noted that construction should not be considered to be seasonal employment. Seasonal employment would refer to an occupation where the activity is constrained by weather or government regulation. Construction is an activity in which full time work is available (depending on economic conditions).

In this case, the worker had returned to full time work in the construction industry. Comparative figures, according to s.45(2) of the pre-1985 Act, were unavailable. Pursuant to s.45(6), the worker's pension should be calculated on the basis of earnings at the time of the accident. The appeal was allowed. [8 pages]

Board Directives and Guidelines: Claims Adjudication Branch Procedures Manual, Document no. 33-08-07

DECISION NO. 494/90 (13/07/90) Onen Lebert Barbeau

Health care (appliances or apparatus) (whirlpool).

The worker suffered a back injury in 1974, at age 50, for which he was awarded a pension. He was now seriously disabled, suffering continuous pain in his back and legs. His doctor had suggested use of a whirlpool as treatment but this was only available at the local hospital. The worker installed a whirlpool in his home and used it two or three times per day.

The worker was entitled to reimbursement for the cost of the whirlpool, pursuant to s.52. Even though whirlpools are available to the public, they can still have legitimate treatment functions. The worker used the whirlpool as a treatment device which reduced his pain and restriction, much as would a TENS machine or

medication. Having the whirlpool in his home eliminated the need to travel at times when he was most in need. The Panel examined alternatives for treatment but found that the whirlpool was best in the circumstances. [7 pages]

Board Directives and Guidelines: Operational Policy Manual, Document nos. 01-04-03, 06-05-05

DECISION NO. 728/87 (03/07/90) Ellis McCombie Nipshagen

Continuing entitlement - Suitable employment - Maximal medical rehabilitation - Procedure (retirement of panel member).

This appeal was heard in 1987, but further investigations were required which were not completed until March 1989. The employer member, who had retired in September 1988, did not feel that he could participate in the hearing because of the passage of time and his absence from the country. On consent, a new panel was appointed. It consisted of the original panel chair and worker member, but a different employer member. It was further agreed that the new panel member would be provided with the transcript, but no rehearing would be necessary.

The worker sought continuing benefits, beyond May 1983, for a back injury which had occurred due to a fall in January 1983.

Benefits had been terminated in May 1983 when a doctor advised that the worker was capable of returning to her regular work. This doctor, and others, were under the mistaken impression that the worker's regular employment only involved driving to people's houses and sitting down. In fact, it involved several trips carrying heavy and awkward boxes, sometimes up several flights of stairs, and kneeling on the floor to display and pack up her wares. This was not "light work", relative to a back injury.

Though most doctors recommended a return to her "light work", they all found tenderness in the L4-5 and S1 regions of the worker's spine. Doctors who thought that the worker was exaggerating her symptoms, had formed their opinions while working with 1983 x-rays which showed a normal spine. X-rays taken in November 1984 showed degenerative disc disease in the L5-S1 area. Such localized degenerative problems, in an otherwise normal spine, were consistent with trauma to a particular spinal segment. Given the continuity of complaint from January 1983, the spinal problem was attributable to the fall.

The worker was entitled to full benefits for her temporary partial disability until November 1984, the date of the x-rays showing the degenerative change. As there had been no significant change in her condition since that time, the worker was entitled to a pension commencing in November 1984. [14 pages]

DECISION NO. 12/90 (13/07/90) Onen Rao Preston

Access to worker file, s. 77 (issue in dispute).

Access to the worker's file was denied. The Board had identified SIEF as being the issue in dispute and considered access on that basis. However, the issue in dispute was actually continuing entitlement and intervening causes. Since there was a mistake in identification of the issue in dispute, one of the essential conditions of s.77 had not been met. [3 pages]

DECISION NO. 848/89 (13/07/90) Moore Higson Preston

Pensions (assessment) (eye) - Blindness (hysterical) - Conversion neurosis (blindness).

The worker was struck in the eye by a small spring. He was awarded a 1% pension.

The worker had a loss of vision to about 20/200. Medical evidence did not support an organic basis for this loss of vision. However, there were extensive references in the medical reports to a non-organic component to the vision loss. The Panel arranged for a consultation with a psychiatrist. The psychiatrist concluded that the worker was suffering from hysterical blindness, which was a conversion disorder. Four of the five criteria for this condition were satisfied. One criterion was not satisfied but the psychiatrist found that this was not unusual considering repression or denial on the part of the worker.

The Panel accepted the opinion of the psychiatrist and found that the worker was suffering from a conversion disorder related to the compensable accident. The worker was entitled to a 12% pension, which was the amount provided in the Rating Schedule for 20/200 vision. [9 pages]

DECISION NO. 521/90I (17/07/90) Onen Fox Seguin

Adjournment (additional evidence).

The worker suffered an injury for which he was awarded a pension. The Hearings Officer found that the worker also suffered from non-compensable back and lung conditions and denied an older worker supplement on the basis that the worker was unable to return to work for reasons other than the compensable disability.

There was minimal evidence in the file concerning these other conditions. The hearing was adjourned. Tribunal counsel was instructed to attempt to obtain more evidence. [4 pages]

WCAT Decisions Considered: 910/88

DECISION NO. 758/88 (17/07/90) Strachan Robillard Preston

Supplements, temporary (rehabilitative purpose).

A carpenter suffered a left knee injury for which he was awarded a 10% pension, later increased to 15%. The worker appealed a decision of the Appeals Adjudicator denying a temporary supplement from July 1983 to February 1985 and denying an increase in the pension.

The worker was approximately 60 years old in 1983. Considering his age, education, geographical location, insistence on a carpentry job within the union jurisdiction and reluctance to seek any other form of work, the Panel found that there was no purpose in granting a supplement since it was totally unrealistic for the worker to expect to find employment in his chosen area. The appeal regarding the supplement was dismissed.

Medical reports indicated that the worker's knee would continue to deteriorate. The Panel directed the Board to reassess the worker for an adjustment to his pension. [7 pages]

WCAT Decisions Considered: Decision No. 915 (1987), 7 W.C.A.T.R. 1; Decision No. 124/88 (1988), 9 W.C.A.T.R. 231

DECISION NO. 439/90 (17/07/90) Onen Fox Jago

Pensions (assessment) (back) - Supplements, temporary (rehabilitative purpose).

The worker suffered a low back injury in 1957, for which he was now receiving a 30% pension. In November 1987, the worker was awarded an older worker supplement. The worker appealed a decision of the Hearings Officer denying a further increase in the pension and denying a temporary supplement subsequent to November 1987.

The worker had a significant disability which caused him continuous pain and which restricted him from carrying out many of the normal functions of living. However, he did not have an immobile spine. Comparing the worker's disability with the Rating Schedule of 30% for an immobile spine, the Panel found that the worker's condition was severe but not more severe than an immobile spine.

The worker was now age 56. He had demonstrated an ability to persevere and work despite a chronic disability. He genuinely desired to return to work. However, he suffers from increasing pain as he works and his tolerance is reduced markedly. His disability prevented him from carrying out the functions required in most jobs. Retraining was not a reasonable alternative, considering his age, requirements of training, his physical intolerance and limitations. There was no rehabilitative purpose to a temporary supplement.

The appeal was dismissed. [12 pages]

WCAT Decisions Considered: Decision No. 915 (1987), 7 W.C.A.T.R. 1

**DECISION NO. 523/90 (17/07/90) McIntosh-Janis Drennan Apsey
Seaton v. Krijan**

Section 15 application - In the course of employment (personal activity).

The plaintiff was the sole owner, operator and shareholder of a limited company. He performed physical labour as well as administrative duties. The plaintiff was involved in a motor vehicle accident while proceeding to a client to pick up a cheque. The accident occurred during the Christmas season while the plaintiff's company was closed.

The plaintiff was in the course of employment at the time of the accident. The plaintiff went out for the purpose of picking up the cheque. He was not running any other personal errands. His sole purpose was related to his employment duties. The Panel distinguished this case from Decision No. 993/88, in which picking up a cheque was a last minute addition to otherwise personal errands.

The plaintiff's right of action was taken away. [7 pages]

WCAT Decisions Considered: 993/88

DECISION NO. 513/90 (17/07/90) McIntosh-Janis Lebert Meslin

Pensions (arrears) - Maximal medical rehabilitation.

The worker suffered a number of back injuries, the last of which occurred in February 1978. In December 1986, he was awarded a 10% pension retroactive to February 1986. The worker appealed a decision of the Hearings Officer confirming the backdating of the pension.

The Board chose February 1986 because it was three months prior to a report indicating the presence of a permanent disability. However, that report stated that it was based on an examination of the worker in April

1985. The Panel then considered the medical reports in reverse chronological order from April 1985 for indications of permanent disability and found that the appropriate date for arrears should be determined with regard to a report in July 1983.

The Board was directed to consider arrears with regard to that report. The issue of the proper date for arrears of an older worker supplement was remitted to the Board for reconsideration in view of the decision regarding pension arrears. [7 pages]

DECISION NO. 773MA (18/07/90) Moore Lebert Clarke

Disability - Temporary total disability (commencement of benefits).

In Decision No. 773M, the Panel found that the worker was temporarily totally disabled as a result of a recurrence of a compensable injury. The recurrence occurred in May 1981 while the worker was on vacation. He returned from his vacation in June 1981. The issue was whether benefits should commence in May or in June.

Benefits are payable under s.39 of the pre-1985 Act where temporary total disability results from an injury. The benefits are payable when the worker is disabled, not when he is injured. The worker had no lost time from work until his return from vacation in June 1981. The worker was entitled to temporary total disability benefits from June 1981. [6 pages]

WCAT Decisions Considered: 773M, 305/87, 425/88

DECISION NO. 308/90 (18/07/90) Faubert Higson Meslin

Continuing entitlement.

The worker suffered a knee injury in 1981. In February 1982, he suffered a recurrence. The worker appealed a decision of the Hearings Officer denying benefits subsequent to March 1982.

On the evidence, the acute episode resolved by March 1982. The worker was not entitled to further temporary benefits. [7 pages]

DECISION NO. 339/90 (18/07/90) Starkman Robillard Preston

Second Injury and Enhancement Fund (preexisting condition).

The employer appealed a decision of the Hearings Officer denying SIEF relief. The worker started work on his first day of employment at 3:00 p.m. He agreed to work overtime. At 5:00 a.m., he was injured when his hand was caught in a saw blade. The employer submitted that the worker had been smoking marijuana and that this constituted a preexisting condition.

The worker denied smoking marijuana. There were some discrepancies in the evidence of a co-worker who testified that the worker had smoked marijuana during the first shift. The Panel preferred the evidence of the worker and found that he had not smoked marijuana.

Even if the worker had smoked marijuana, it would not have amounted to a disability which caused or contributed to the severity of the accident. In this case, there was no evidence of addiction, the effects

would have worn off by the time of the accident and, in any event, the major cause of the accident was fatigue from working more than 12 hours.

The appeal was dismissed. [6 pages]

Board Directives and Guidelines: Claims Adjudication Branch Procedures Manual, Document nos. 33-28-01, 33-28-02

DECISION NO. 869/88 (18/07/90) Carlan Lebert Apsey

Hearing loss - Aggravation (preexisting condition) (hearing loss).

The worker suffered compensable hearing loss while working as an underground miner from 1953 to 1979. In 1979, the worker transferred to work as a tool room attendant. The worker appealed a decision of the Hearings Officer denying entitlement for further hearing loss while working in the tool room.

On the evidence, noise levels in the tool room were below hazardous levels. Medical opinion stated that the worker was not particularly vulnerable because of his preexisting condition. Further, the evidence of increased hearing loss was questionable.

The appeal was dismissed. [8 pages]

DECISION NO. 428/90 (17/07/90) Faubert Robillard Nipshagen

Access to worker file, s. 77.

The employer was granted access to the worker's file, except for one medical report which had no bearing on the issues raised. [3 pages]

DECISION NO. 454/90 (17/07/90) Onen Klym Barbeau

Impairment of earning capacity - Significantly greater than is usual - Supplements, temporary (rehabilitative purpose) - Temporary disability (beyond pension level).

The worker suffered a low back injury in June 1985. In December 1987 her level of impairment was assessed at 20% for pension purposes. The worker sought temporary benefits between January 1988 and September 1988. She also sought supplementary benefits between September 1988 and July 26, 1989, when she began receiving benefits under s.135(4) of the transitional provisions of the legislative amendments which became effective on that date.

The worker was entitled to temporary total disability benefits from January to September 1988, as she was suffering from a temporary exacerbation of her disability during that period. Her doctors' evidence indicated that she was unable to work and required intensive therapy. Moreover, a work assessment program that concluded in January 1988 had deemed the worker to be unemployable.

The Panel disagreed with the Board's finding that the worker's impairment of earning capacity was not significantly greater than that of the average worker. The Board determined that the difference between the worker's pre-accident earnings (\$260 weekly) and her earning capacity (\$190 weekly) constituted a 27% reduction in her earning capacity. The Board concluded that the 7% difference between that amount and her 20% pension assessment was insignificant.

There was no evidence to support the \$190 amount which assumed a full-time job at the minimum wage. The worker was not capable of full-time work due to her disability. Her limited education, language skills and experience further restricted her ability to earn income. A more realistic estimate of her earning capacity was \$100 weekly which resulted in a 61% earning impairment. The 41% difference between this and her pension level was significant.

The worker was always co-operative in attempts at rehabilitation. Though subsequent assessments showed that the worker was unemployable due to her pain condition, this was not known in September 1988 and she should have been given a second opportunity to determine whether she could return to work. Although the attempt was not successful, the undertaking was reasonable. It was thus reasonable to pay supplementary benefits during the period in question on the basis that the worker could benefit from rehabilitation. [9 pages]

WCAT Decisions Considered: 802/88

DECISION NO. 98/90 (18/07/90) Marcotte McCombie Preston
Drake v. Ducharme

Section 15 application - Worker (contract of service) (employment relationship) - Volunteer.

The plaintiff did appliance repair work at an apartment building as an independent contractor. The plaintiff's wife was the rental agent at the building, for which she received rent-free occupancy. In 1987, the wife became the building manager. In May 1988, she received a call from security personnel. The husband went to the lobby in response and was assaulted. The husband brought an action against the owners of the building.

Board policy provides that a caretaker's spouse receives the protection of the Act where it is implied that the spouse will assist or where the spouse performs duties with the full knowledge and consent of the owner. The policy also provides that coverage should not be extended to other family members assisting on a voluntary basis. The defendants submitted that the wife and her husband were hired as a management team. The plaintiff submitted that he was simply a volunteer helping his wife and that there was no employment relationship between him and the defendants.

The Panel found that the plaintiff was involved in security and maintenance matters on an episodic or periodic basis. There was no credible documentation indicating that the plaintiff was an employee of the defendants. The defendants knew that the plaintiff would be assisting his wife in her management duties, either with the concurrence of the owners or without objection. However, if the defendants had intended that such assistance would bring the plaintiff within the ambit of an employment relationship, it is reasonable that there would have been some documentary evidence of that relationship.

The defendants failed to establish that the plaintiff was an employee. The Panel found that the defendants accepted that the plaintiff agreed to assist his wife on a voluntary basis. According to Board policy, the plaintiff was not covered by the Act. The plaintiff's right of action was not taken away. [29 pages]

WCAT Decisions Considered: 577

Board Directives and Guidelines: Claims Services Division Manual, s.1(1)(o), p.18, Directive 3

Cases Considered: Mayer v. J. Conrad Lavigne Ltd. (1979), 27 O.R. (2d) 129

DECISION NO. 449/90 (20/07/90) Moore Rao Apsey

Access to worker file, s. 77.

Access to the worker's file was granted to the employer. [3 pages]

**DECISION NO. 305/90 (19/07/90) Hartman Rao Preston
Leduc v. Courville**

Section 15 application - In the course of employment (dual purpose test).

The plaintiff in a civil action applied to determine whether his right of action was taken away. The plaintiff was a car salesman at a dealership in a rural area. He was injured in a motor vehicle accident while driving a new car. He claimed that he was driving to another town partly for the personal reason of visiting his family and partly for the business reason of seeing two prospective customers. The accident took place outside his regular shift and he was not paid for his time.

The Panel found that the plaintiff was in the course of employment. The plaintiff was in a rural area where only 50% of sales arose from customers visiting the lot. It was probable that the plaintiff was travelling with the intention of showing the new car to the two prospects. As a salesman, the plaintiff was never paid for his time, whether on shift, at a prospect's residence off hours or on the road generally prospecting.

The right of action was taken away. [8 pages]

WCAT Decisions Considered: Decision No. 420 (1986), 3 W.C.A.T.R. 168

DECISION NO. 519/90 (20/07/90) Strachan Fox Meslin

Delay (onset of symptoms).

The worker appealed a decision of the Hearings Officer denying entitlement for a neck disability which she related to work in a nursing home. The worker worked in the nursing home from June 25 to July 11, 1986. After that, she continued to work for a home care agency until November 1986.

The worker began to feel pain and numbness in her arms in October 1986. These symptoms were different than the symptoms which she claimed caused her to leave her employment with the nursing home. The Panel found that the worker's disability was related to a combination of preexisting congenital Sprengel's deformity and kyphoscoliosis and to degenerative changes. The worker was not entitled to benefits. [6 pages]

DECISION NO. 70/90 (23/07/90) Carlan Beattie Preston

Disablement (nature of work) - Aggravation, preexisting condition (osteoarthritis) - Benefit of the doubt.

The worker appealed a decision of the Hearings Officer denying entitlement for knee surgery in 1983. The worker was a meter reader, who walked about 15 miles per day as well as frequently climbing steps. He had three compensable minor knee strains since 1978.

The worker had preexisting underlying degenerative osteoarthritis. There was conflicting medical opinion as to the role of work activities to the development and progression of the underlying condition. The conflicting opinions came from equally qualified doctors who had full and equal knowledge of the facts. The Panel applied the benefit of the doubt and found the worker had an underlying condition that probably would have developed and required surgery at some point but that the physical demands of his job placed an excessive burden on his knees and accelerated the progression of the disease.

The appeal was allowed. [8 pages]

DECISION NO. 84/90 (24/07/90) Kenny McCombie Preston

Hearing loss.

The worker's widow appealed a decision of the Hearings Officer granting health care benefits for hearing loss but denying a pension. The Hearings Officer relied on results of an audiogram from after the worker stopped working to find that the worker had hearing loss of 35 decibels in one ear and 30 decibels in the other ear and that, therefore, the worker did not have sufficient hearing loss to qualify for a pension under the old Board policy.

The Panel took the average of a number of audiograms taken up to the time the worker stopped working. Using this average (reduced for a presbycusis factor for age exceeding 60), the worker had bilateral hearing loss of 35 decibels, which was the amount required by the Board's old policy. The Panel also noted a background paper on hearing loss which stated that audiogram results have a margin of error of plus or minus 5 decibels.

The appeal was allowed. [4 pages]

WCAT Decisions Considered: 55/87

DECISION NO. 450/90 (24/07/90) Moore Rao Apsey

Access to worker file, s. 77.

Access to the worker's file was granted to the employer, except for two non-medical documents. [3 pages]

DECISION NO. 544/90 (24/07/90) Strachan McCombie Nipshagen

Pensions (arrears).

The worker suffered a facial injury for which he was awarded a 5% pension for organic disability in November 1981. In 1989, the award was increased to 10% retroactive to September 1988. The worker appealed regarding the date for payment of arrears.

The Panel reviewed the medical reports and found that, by November 1982, the worker had a permanent condition diagnosed as post-traumatic neuralgia. There was little difference in findings of Board doctors from March 1983 to February 1989. The worker was entitled to arrears to November 1982, which was three months prior to the examination in March 1983 and which also coincided with the findings regarding the neuralgia. [7 pages]

DECISION NO. 448/90 (25/07/90) Moore Rao Apsey

Access to worker file, s. 77.

Access to the worker's file was granted to the employer. [3 pages]

DECISION NO. 304/90I (24/07/90) Moore Ferrari Jago

Adjournment (additional medical evidence) - Dupuytren's contracture.

The worker appealed a decision of the Hearings Officer denying entitlement for Dupuytren's contracture. The Hearings Officer found that the condition was not causally related to employment. However, the Hearings Officer did not consider whether the condition was an aggravation of a preexisting condition. The Panel required additional medical information regarding Dupuytren's contracture and repetitive work in order to determine this issue. The hearing was adjourned. The Tribunal Counsel Office was directed to arrange an examination of the worker and to obtain further medical evidence. [8 pages]

WCAT Decisions Considered: 710, 300/88, 434/88

DECISION NO. 501/90 (25/07/90) Starkman Fox Jago

Disablement (nature of work) - Aggravation (preexisting condition) (spondylosis) (cervical).

The worker appealed a decision of the Hearings Officer denying entitlement for a neck condition. The worker had been doing light assembly work since September 1984. She laid off in November 1986.

The Panel found that the worker began to experience symptoms shortly after beginning the assembly work. The work aggravated preexisting cervical spondylosis. Her condition deteriorated over the next two years until she had to lay off.

The appeal was allowed. [7 pages]

DECISION NO. 554/90 (25/07/90) Carlan Cook Preston

Access to worker file, s. 77.

Access to the worker's file was granted to the employer. [3 pages]

DECISION NO. 26/90 (24/07/90) Moore Fox (dissenting) Apsey

Aggravation (preexisting condition) (disc, degeneration) - Disablement (strenuous work) - Injuring process - Upholsterer.

The worker started receiving regular medical treatment for back pain in 1981. From March 1985 on, the worker had a number of lengthy periods of absence from work due to his back disability. The back pain which disabled the worker was the result of a degenerative condition in his lower back. The worker claimed that

this was the result of an injuring process that arose out of his employment as an upholsterer, and which amounted to an accident in the form of a disablement under s. 1(1)(a)(iii).

The majority of the Panel found that the worker was not entitled to benefits. In 1981, the worker merely began exhibiting symptoms which were evidence of the disabling nature of the preexisting degenerative disc disease. The degenerative changes in the worker's lower spine were part of an overall pattern of degeneration in the worker's spine that commenced in 1975. The worker's job was made more difficult by the degenerative changes. However, the medical evidence did not establish either that the degenerative disc disease resulted from the heavy work, or, that the degenerative process was added to or accelerated by the heavy work. All that could be said was that the worker's job made the effects of the condition more noticeable than they might have been, had the worker been employed in a lighter job.

The Worker Member, dissenting, would have granted entitlement. While suffering from the preexisting condition, the worker continued to work for many years as an upholsterer which required bending, squatting, twisting and lifting. These activities subjected him to ever-increasing pain until he became unable to work. It stretched belief to suggest that the relentless progress of the condition would have continued regardless of his work activity. He was working in constant pain and suffering micro-trauma every day on the job. [12 pages]

WCAT Decisions Considered: Decision No. 280 (1987), 6 W.C.A.T.R. 27; Decision No. 565 (1987), 4 W.C.A.T.R. 238; Decision No. 559/87 (1988), 9 W.C.A.T.R. 103; Decision No. 652/87 (1988), 10 W.C.A.T.R. 75

DECISION NO. 528/90 (26/07/90) Starkman Higson Jago

Blisters.

The worker was entitled to benefits for blisters to both of his feet. He had never had blisters prior to commencing work with the accident employer. He was working 12 hour shifts as a welder. On the day before noticing the blisters, the worker's duties included shovelling some acidic sludge from a tank. He was wearing his own safety boots rather than rubber boots which had been provided to some of the labourers performing the work.

The cause of the blisters could not be ascertained on the evidence. Nevertheless, the Panel was satisfied that work was a significant contributing factor to the blisters. [4 pages]

Board Directives and Guidelines: Claims Services Division Manual, s. 1(1)(a), p. 12, Directive 8

DECISION NO. 458/90L (26/07/90) Bigras Fox Howes

Leave to appeal (good reason to doubt correctness) (consideration of issue).

The worker sought leave to appeal a decision of the Appeal Board which denied him entitlement for a low back disability for periods from April 1982 to November 1982 and from April 1983 to November 1984.

The worker had sustained an ankle and neck injury at work in July 1981. Before the Appeal Board, the worker argued that this accident had aggravated a preexisting back condition. The Appeal Board concluded that there was no evidence of a low back condition causally related to the July 1981 accident.

The Appeal Board found that between July 1981 and March 1982 the worker was seen for first aid and medical attention at the employer's medical department on 12 different occasions for problems relating to his neck, left leg and foot. This finding gave the Panel reason to believe that the compensable condition related to the July 1981 accident may have been present for some time after the accident. The Appeal Board should have addressed the issue of the worker's neck, leg and foot disability since this was the injury sustained in the accident.

There was good reason to doubt the correctness of the Appeal Board decision as it made no findings on the worker's compensable medical conditions and based its conclusion on the worker's lumbar back condition, a medical issue not involved with the worker's compensable condition. Leave to appeal was granted. [4 pages]

DECISION NO. 459/90 (27/07/90) Bigras Fox Howes

Access to worker file, s. 77.

Access to the worker's file was granted to the employer. [3 pages]

DECISION NO. 540/90L (27/07/90) Bigras Lebert Preston

Leave to appeal (good reason to doubt correctness) (evidence to support Appeal Board conclusion).

The worker suffered a back strain in 1965 and received benefits for about one week. The Appeal Board denied entitlement for benefits in 1973 on the basis of lack of continuity. There was evidence to support the Appeal Board conclusion. Leave to appeal denied. [3 pages]

DECISION NO. 110/89R (27/07/90) Marcotte Drennan Jago

Reconsideration (consideration of evidence).

The worker's request to reconsider Decision No. 110/89 was denied. The Panel carefully considered all the evidence in reaching its conclusion, including the medical evidence and statements by the worker. [4 pages]

DECISION NO. 541/90 (27/07/90) Bigras Lebert Preston

Continuing entitlement.

The worker suffered a neck and back injury in March 1980. In September 1980, he suffered an elbow injury while at HRC. In November 1987, he underwent elbow surgery and received full benefits until April 1988. The worker appealed a decision of the Hearings Officer denying benefits subsequent to April 1988.

On the evidence, the worker no longer had a disability in April 1988 and, therefore, he was not entitled to further temporary benefits. However, there was some indication in 1989 and 1990 of the onset of bursitis. The Board was directed to conduct an assessment to determine whether the worker was entitled to a pension. [6 pages]

DECISION NO. 526/90 (27/07/90) Starkman Higson Jago

Continuing entitlement - Rehabilitation, vocational (programme not offered by Board).

The worker appealed a decision of the Hearings Officer denying benefits for a back disability subsequent to September 1985, when he was discharged from HRC to regular work.

Medical reports indicated the the worker had restriction of movement on admission and discharge from HRC. The Panel found that the worker was still temporarily partially disabled after his release from HRC. The Board did not offer a rehabilitation programme. The worker did not make much effort to find employment. The Panel concluded that the worker was entitled to 50% benefits from September 1985 to December 1985. Subsequent entitlement was referred back to the Board for investigation and decision. [7 pages]

DECISION NO. 337/90 (09/08/90) Bigras Cook Apsey

Board Directives and Guidelines (fibromyalgia) - Fibromyalgia.

The worker's combined pension rating was 53%, including 20% for a knee disability. The remaining portion of the pension was for organic back, foot and hand injuries. The worker sought additional benefits for a fibromyalgia syndrome which resulted from his knee injury in 1967. This claim had been denied by the Hearings Officer because he could not find a psychotraumatic disability attributable to the compensable condition.

In accordance with the provisions of Document No. 03-03-07 of the Board's Operational Policy manual, the worker chose to be considered for benefits under the policy for psychotraumatic disability. Those provisions, were merely intended as a means of handling fibromyalgia cases pre-dating July 3, 1987. Entitlement for fibromyalgia did not require evidence of psychotraumatic disability. Fibromyalgia was a separate medical condition from psychotraumatic disability.

Only one doctor diagnosed fibromyalgia. He did so on the basis of the worker's "tender points" typical of fibromyalgia, his non-restorative sleep pattern and fatigue. This 1988 diagnosis of fibromyalgia was not supported by the worker's prior medical history. In his testimony, the worker consistently attributed his pain and discomfort to his knee, back and hand injuries, with respect to which it was universally acknowledged that he suffered from osteoarthritis. The worker did not complain of unexplained pain in other areas and was unaware of any "tender points". The worker's sleeping difficulties were attributable to the pain in his knees and the effects of his medication. In his evidence, the worker did not complain of unusual fatigue, but admitted to a decreased energy level following a myocardial infarction and related surgery.

The worker was not entitled to benefits for fibromyalgia. [11 pages]

WCAT Decisions Considered: Decision No. 18 (1987), 4 W.C.A.T.R. 21; Decision No. 915 (1987), 7 W.C.A.T.R. 1
Board Directives and Guidelines: Operational Policy Manual, Document no. 03-03-07; Discussion Paper, Fibromyalgia Syndrome, September 23, 1988

DECISION NO. 555/90 (09/08/90) Bradbury McCombie Nipshagen

Second Injury and Enhancement Fund - Disc, protruding.

The employer appealed the granting of initial entitlement to the worker for a low back disability and the granting of SIEF relief at only the 50% level.

The worker was involved in two car accidents, both in February 1986. He returned to construction work in August 1986. In November 1986, while he was working in a crouched position on one knee, he twisted to his right and fell to the ground. Surgery was required for a protruding disc.

The worker suffered an accident arising out of his employment. The type of injury that occurred was consistent with the job duties that the worker was performing at the time of the onset of the disability. The bending and twisting movement was a significant contributing factor to the protruding disc. The worker was thus entitled to benefits.

Though the worker had ongoing discomfort and had some problems as late as July 30, 1986, he did not require ongoing treatment after that date. He had recovered sufficiently that he was not prevented from performing heavy manual labour. However, the car accidents could have resulted in the worker being more likely to develop a disability of greater severity than a person who had not suffered such accidents. The car accidents were properly considered to be minor accidents under Board policy. The work accident was also one that would have been expected to cause only a minor disabling injury. In such circumstances, 50% SIEF relief was appropriate. The appeal was dismissed. [7 pages]

DECISION NO. 515/90 (10/08/90) Chapnik McCombie Preston

Access to worker file, s. 77 (deletion of material).

Access to the worker's file was granted to the employer.

The worker objected to access on the basis that the employer had previously accepted the allowance of benefits to the worker. As long as there was a valid issue in dispute, there was nothing to preclude access on the basis that the employer had changed its mind about objecting.

With respect to relevant medical reports, it would establish a dangerous precedent to allow the worker to have deleted those parts which the worker considered irrelevant. The Panel was not prepared, in a Section 77 Application, to make a determination of the extent of the relevance of any particular piece of information within a medical document. [4 pages]

WCAT Decisions Considered: Decision No. 322/90

DECISION NO. 516/90 (10/08/90) Chapnik McCombie Preston

Access to worker file, s. 77 (issue in dispute) (relevance) (prior claim files)

The worker objected to the employer receiving access to the medical information in the worker's file on the grounds that the information would be used against the worker to jeopardize his employment situation and that this was a fishing expedition by the employer to pass the blame to some other company.

The employer had raised two valid issues in dispute, being the worker's entitlement to benefits beyond 30 days and the employer's entitlement to SIEF relief. The information objected to was relevant to these issues and should thus be disclosed to the employer, as there was no convincing evidence of potential harm to the worker. Though the Panel could not guarantee that the employer would not misuse the medical records, it was confident that there were strong incentives against such action.

In an addendum, the Panel found that the medical information in the worker's claim files, relating to two prior accidents for which the worker had received benefits, were relevant to the issue of SIEF and should be released to the employer. [6 pages]

WCAT Decisions Considered: Decision No. 350/88 (1988), 9 W.C.A.T.R. 298; Decision No. 322/90

DECISION NO. 419/90L (10/08/90) Hartman Higson Meslin

Leave to appeal (substantial new evidence) (medical report) - Leave to appeal (good reason to doubt correctness) (consideration of issue).

The worker sought leave to appeal a 1967 decision of the Appeal Board which denied him entitlement for a disability which he described as left-side pain from his neck to his heel. The worker claimed that this disability was related to compensable accidents in 1954 and 1959.

In 1954 a claim was opened for a groin injury, but there was no lost time. In 1959 the worker made a claim for which his accident report indicated that the cause of the lay-off was a lifting incident that led to an inguinal hernia. Entitlement was denied on the basis that the lay-off was not related to the lifting incident, but to the treatment of the worker's longstanding complaints of extensive pain. No causal relationship to the 1954 accident was found because of the lack of continuity of complaint and medical treatment. The worker now claimed that the 1959 hernia was a fabrication of the employer, Board and doctors and that the 1959 lay-off was due to back complaints stemming from the 1954 accident.

Reports by the worker's family doctor and chiropractor, written in 1989 and 1990, did not constitute new evidence. The doctor suggested that degenerative arthritis was present before the 1954 accident and was aggravated by it. Arthritis was discussed as a cause of the worker's complaints in the material before the Appeal Board. The chiropractor offered no explanation of how a 1954 blow to the groin could cause spinal degeneration diagnosed in 1990.

Whether or not the worker had an inguinal hernia was irrelevant. Considering the worker's claim that nothing happened in 1959, the issue became whether there was a relationship between his 1959 back complaints and the 1954 accident. Nothing presented by the worker led the Panel to doubt the correctness of the decision that there was no such causal relationship. [7 pages]

DECISION NO. 110/90 (10/08/90) Carlan McCombie Shuel

Osteoarthritis - Fibromyalgia.

The worker suffered a right knee injury in 1969. For this, and related left knee and low back conditions, the worker was receiving a 50% pension. Commencing in 1978 the worker began to experience pain in his neck, shoulders, hands and feet. He claimed that this generalized condition was either osteoarthritis or fibromyalgia that resulted from the 1969 accident and its accompanying problems.

It was undisputed that the worker was suffering from osteoarthritis in his knees, and it was largely on that basis that he was granted a pension for his bilateral knee condition. There was little medical evidence that the worker was suffering from osteoarthritis, secondary to his compensable accident, in his shoulder, neck, hands, or feet. There was clinical and radiological evidence of the osteoarthritis in the knees, but nine years after the start of the symptoms, there was still no such evidence with respect to the other areas.

Considering the passage of nine years between the accident and the time of the first complaints that could possibly relate to fibromyalgia, and considering the fact that there was only one diagnosis of fibromyalgia, it was more probable than not that the worker did not have fibromyalgia.

The worker was not disabled beyond the level for which he was already being compensated. [7 pages]

DECISION NO. 538/90 (13/08/90) Bradbury Jackson Barbeau*Suitable employment.*

On the evidence, the worker did not refuse suitable work offered by the accident employer.

The worker responded to the employer's telephone calls and made his own contacts, both to the employer and to the Board. According to Board memos, the position offered involved clerical work which was inappropriate for the worker, who was illiterate. The worker attended at the specialist to whom he was referred by his family doctor and continued his physiotherapy as recommended by the specialist. When the specialist advised that the worker was ready to return to work, the worker agreed and did return. [5 pages]

DECISION NO. 701/88R (13/08/90) Bradbury Lebert Preston*Reconsideration - Damages, contribution or indemnity - Section 15 application (remoteness).*

The third party in a court action which arose out of a motor vehicle accident, requested that Decision No. 701/88 be reconsidered to determine the effect of s. 8(11) of the Act. In that decision, the Panel determined that the defendant's action against the third party had not been taken away by s. 8(9). The defendant was not a worker or employer at the time that the accident occurred. The third party was a Schedule 1 employer carrying on business as a hotel that sold liquor. The defendant's third party action alleged that the hotel negligently served alcohol to the defendant. In Decision No. 701/88 it was found that there was an insufficient employment connection to bring the third party action within the scope of the Act.

Section 8(11) is not intended to limit damages against Schedule 1 employers in all circumstances. To grant the hotel blanket protection would contravene the purpose of the accident fund which is to pay compensation to injured workers for workplace injuries. The Divisional Court's decision in the case of Meyer v. Ontario (Workers' Compensation Board) states that s. 8(11) has to be read with s. 8(9) and suggests that words should be read into s. 8(11) which imply an employment connection. Since the Panel had previously found that there was an insufficient employment connection to bring the sale of liquor within the scope of the Act, it followed that there was also an insufficient employment connection to bring the matter within s. 8(11).

Section 8(11) did not limit the recovery of damages, contribution or indemnity against the hotel. [6 pages]

WCAT Decisions Considered: Decision No. 337 (1986), 2 W.C.A.T.R. 141; Decision No. 701/88 (1989), 11 W.C.A.T.R. 150
Cases Considered: Meyer v. Ontario (Workers' Compensation Board) (1986), 15 O.A.C. 202 (Div. Ct.), revd. in part (March 22, 1988) (Ont. C.A.)

DECISION NO. 461/90 (15/08/90) Starkman Beattie Preston*Temporary partial disability (wage loss benefits) (loss of bonus) - Delay (claim) - Death (maintenance of claim by estate).*

The worker suffered a back injury in November 1964 and a neck injury in May 1968. He appealed a decision of the Hearings Officer denying continuing benefits but died prior to the hearing.

The Panel found that the claim could be maintained by the worker's spouse.

In January and February 1965, the worker was on light duty at full salary. However, he was not eligible for a bonus to which he would have been entitled had he been performing his regular work. The Panel found that the worker was entitled to a wage top up to be calculated on the basis of his productivity during the six months prior to the accident.

The worker was not entitled to benefits subsequent to 1969. The first accident was minor with no lost time. The second accident resulted in two weeks of lost time. There was a delay in seeking benefits for this period. Medical reports did not relate the ongoing condition to the compensable accidents. [8 pages]

WCAT Decisions Considered: Decision No. 113/89 (1989), 10 W.C.A.T.R. 355; Decision Nos. 148/87, 176/88

DECISION NO. 568/90I (15/08/90) McIntosh-Janis McCombie Jago

Adjournment (addition of representative).

Tribunal counsel prepared an addendum to the Case Description regarding an issue raised by the employer concerning the effect of Bill 162 on the issues under appeal. However, this addendum was not received by the parties within three weeks of the hearing. The worker had intended to represent himself but felt he needed a representative to assist him regarding the complex legal issues raised in the addendum. An adjournment was granted. [3 pages]

DECISION NO. 856/89 (16/08/90) Carlan Fox Seguin

Consequences of injury (iatrogenic illness) (medication) (tinnitus) - Tinnitus.

The worker appealed a decision of the Hearings Officer denying entitlement for tinnitus. The worker was receiving benefits for hearing loss. The tinnitus was related at least in part to medication that the worker was prescribed for a compensable back condition. The Panel was satisfied that the worker's tinnitus met the requirements of the Board guidelines. The appeal was allowed. The Board was directed to award a 2% pension. [4 pages]

WCAT Decisions considered: 941/88

DECISION NO. 313/90R (16/08/90) Bigras Lebert Seguin

Reconsideration.

The worker's request to reconsider Decision No. 313/90 was denied. The worker's request included a review of the evidence presented at the hearing but presented no new facts which could be seen as possible reasons to change the Panel's findings. [3 pages]

WCAT Decisions considered: Decision No. 95R (1989), 11 W.C.A.T.R. 1; Decision Nos. 72R, 72R2, 313/90

DECISION NO. 578/90 (16/08/90) Kenny Ferrari Meslin

Pensions (assessment) (back) - Supplements, temporary - Significantly greater than is usual.

The worker suffered back injuries in 1980 and 1981. He appealed a decision of the Hearings Officer confirming a 10% pension and denying a temporary supplement.

There was objective evidence of disc herniation but there was little or no evidence of nerve root involvement and little or no restriction of movement. However, the worker could not do heavy lifting or repetitive bending. The Panel found that the pension was rated correctly at 10%.

The worker's impairment of earning capacity was significantly greater than is usual. He could not perform his pre-accident job and he could not find a job with comparable income. He was motivated to return to work and a supplement would have served a rehabilitative purpose. The worker was entitled to a supplement.

The appeal was allowed in part. [8 pages]

WCAT Decisions Considered: Decision No. 915 (1987), 7 W.C.A.T.R. 1

Board Directives and Guidelines: Claims Adjudication Branch Procedures Manual, Document no. 33-20-02

DECISION NO. 164/87 (16/08/90) Carlan Robillard Jewell

Exposure (lead).

The worker's widow appealed a decision of the Appeal Board denying entitlement for lead poisoning. The worker was a door fitter for an automobile manufacturer from 1942 until his retirement in 1969 at age 68. He died in 1978.

The vast majority of medical opinions indicated that the worker was not suffering from lead poisoning but, rather, from myelofibrosis. Even if there was exposure to lead in the workplace, testing carried out in the workplace indicated that door fitters in the exposure area were not experiencing high lead levels. The appeal was dismissed. [8 pages]

DECISION NO. 510/90 (30/07/90) Bradbury McCombie Preston

Access to worker file, s. 77.

Access to the worker's file was granted to the employer. [3 pages]

DECISION NO. 509/90L (30/07/90) Bradbury McCombie Preston

Leave to appeal (good reason to doubt correctness) (Appeal Board procedure) - Leave to appeal (good reason to doubt correctness) (consideration of issue).

The Appeal Board denied continuing benefits and a pension. There was good reason to doubt correctness of the Appeal Board decision since the decision was not signed by all the appeal commissioners, contrary to usual practice, leaving doubt that all the commissioners participated in the decision. In addition, the Appeal Board failed to consider the issue of aggravation of a preexisting condition and also failed to consider supportive medical evidence.

Leave to appeal was granted. The appeal would be scheduled to be heard with an appeal from a decision of the Hearings Officer which denied entitlement for chronic pain. [4 pages]

WCAT Decisions Considered: 756L

DECISION NO. 487/90 (31/07/90) Stewart McCombie Howes

Access to worker file, s. 77.

Access to the worker's file was granted to the employer. [3 pages]

DECISION NO. 486/90 (31/07/90) Stewart McCombie Howes

Access to worker file, s. 77.

Access to the worker's file was granted to the employer. [3 pages]

DECISION NO. 488/90 (31/07/90) Stewart McCombie Howes

Access to worker file, s. 77.

Access to the worker's file was granted to the employer, except for an irrelevant reference to a personal matter in one report. [3 pages]

DECISION NO. 489/90 (31/07/90) Stewart McCombie Howes

Access to worker file, s. 77.

Access to the worker's file was granted to the employer, except for specific personal information contained in one report. [3 pages]

DECISION NO. 479/90 (31/07/90) Stewart Felice Nipshagen

Delay (onset of symptoms).

The worker appealed a decision of the Hearings Officer denying entitlement for a prolapsed disc in 1986. On the evidence, an incident occurred at work in February 1985, in which the worker injured her back. However, she did not report the injury or seek treatment. She was able to return to heavy work. The Panel found that a causal relationship between the back condition and the incident at work was not established. The appeal was dismissed. [7 pages]

DECISION NO. 59/90 (01/08/90) Bigras Robillard Gabinet

Impairment of earning capacity (asymptomatic condition) - Maximal medical rehabilitation - Carpal tunnel syndrome.

The worker received benefits for carpal tunnel syndrome arising out of her employment, packaging frozen food for a meat processing firm, from November 1982 to June 1985. The Board terminated her benefits on the

basis that she was no longer suffering from carpal tunnel syndrome. The Board subsequently found that the worker had a chronic pain disorder.

The Panel found little evidence of any residual organic signs of carpal tunnel syndrome beyond June 1985. Symptoms noted by doctors after that date related to the chronic pain disorder for which entitlement had already been granted by the Board. The worker was not entitled to temporary total disability benefits beyond June 1985. As of that date, the worker's organic condition had reached maximal medical rehabilitation.

The worker's carpal tunnel syndrome was currently asymptomatic. However, she could no longer perform work that required repetitive wrist movement without the likely recurrence of her carpal tunnel syndrome. This represented an impairment of earning capacity which resulted from the carpal tunnel syndrome. The worker was thus entitled to permanent disability benefits subsequent to June 1985, independent of the fact that she was developing a chronic pain disorder at the time. [12 pages]

WCAT Decisions Considered: Decision No. 8251

Board Directives and Guidelines: Claims Adjudication Branch Procedures Manual, Document Nos. 33-13-01, 33-20-05

DECISION NO. 199/90 (26/07/90) Chapnik McCombie Shuel

Psoriatic arthritis.

In March 1984 the worker suffered a back injury at work when he stepped backwards and one foot slipped off the platform on which he was standing. He was denied benefits for a condition diagnosed as psoriatic arthritis.

The worker did not seek medical treatment until May 1985. X-rays taken in August 1985 revealed normal results. The worker did not lay off work until October 1985, at which time mechanical low back pain was diagnosed. Two months later, multi-joint arthritis and skin changes symptomatic of psoriatic arthritis were diagnosed. Multiple areas of increased activity in the worker's hands, feet and right knee were noted in April 1986 which suggested a diffuse arthritic condition.

There was no evidence that the worker's job aggravated his condition in a specific manner. There was no causal relationship between the work accident and the worker's condition subsequent to October 1985. The worker's back problems were more likely the result of his overall arthritic condition. [10 pages]

WCAT Decisions Considered: Decision Nos. 130, 811

DECISION NO. 553/90I (01/08/90) McIntosh-Janis Drennan Barbeau

Adjournment (addition of representative) - Merits and justice.

The worker had been informed in writing of his right to representation, however, considering his language difficulties, the value of this was doubtful. Tribunal counsel contacted first the worker's daughter and then the worker adviser who had represented the worker before the Hearings Officer. The latter agreed to represent the worker. However, by this time it was the Friday before the Monday on which the hearing was scheduled and the worker adviser could not attend the hearing due to prior engagements.

The worker appeared at the hearing unrepresented, but the Panel was concerned about the worker's ability to proceed on his own, given the complexity of the issues raised by the appeal. It would not serve the real merits and justice of the case to force the worker to represent himself. The hearing was adjourned. [3 pages]

DECISION NO. 360/90 (01/08/90) Bigras Robillard Seguin

Suitable employment - Preexisting condition (chondromalacia) (knee)

The worker suffered an aggravation of his preexisting non-compensable knee condition at work. He suffered from chondromalacia which resulted in subluxation of the patella. Following a work assessment, he refused to continue in the modified job in which he was assessed and his benefits were terminated. The job involved operating machines which stacked and strapped bundles of particle board.

The Panel found that the worker's condition had returned to its pre-accident state by the time that the work assessment was completed and there were no medical reasons for his lay-off at that time.

During the assessment, the worker was able to perform the duties of the operator's position without any recurrence of the knee-locking incidents which had caused his prior lay-off, or any other medical problem. He even went beyond his restrictions and performed work that he could have left to others. The worker was not entitled to any benefits beyond the time when the assessment period ended and he refused to continue working. [13 pages]

DECISION NO. 559/90 (01/08/90) McIntosh-Janis Cook Barbeau

Permanent disability - Withdrawal (of appeal).

The worker suffered a compensable right shoulder injury in 1978, an aggravation of the shoulder injury in 1980 and a right middle finger injury in 1982. He was receiving pensions for both the 1980 shoulder injury and the middle finger injury. The worker claimed that his right shoulder disability became permanent after the 1978 injury, that the level of the pension award for the shoulder disability was inadequate and that a multiple factor should be applied.

The only multiple factor argument raised before the Hearings Officer related to the shoulder and middle finger, but at the hearing of the appeal, the worker intended to include arguments about a subsequent right thumb injury. As the Panel had no information on the thumb injury, and as there was no final Board decision relating to the multiple factor issue that included consideration of the thumb injury, the worker was allowed to withdraw that issue. As there had been no review of the worker's shoulder injury since March 1985, the issue of the level of the shoulder pension was also withdrawn, pending a further assessment.

Though the worker returned to his pre-accident position shortly after the 1978 shoulder injury, the work was modified and he had the assistance of other workers. He had repeated recurrences leading to substantial periods of lay-off and he continued to receive medical treatment right up to the time of the 1980 injury. The worker's permanent partial right shoulder disability commenced after the 1978 injury and his shoulder pension award should thus be backdated to the date of the 1978 injury. The Panel made no comment as to the adequacy of the existing level of the award or as to the multiple factor issue. [5 pages]

DECISION NO. 542/90 (01/08/90) Bigras Lebert Preston

Parties (representation) (representative instructed to withdraw) - Accident (occurrence) - Tendonitis (wrist).

The worker chose not to attend on the employer's appeal and advised the representative, who had been authorized to act on his behalf at previous hearings, that he wished her to withdraw from the case. The representative nonetheless appeared and requested clarification of her standing. This was not just a case of absence of authority. As there was an instruction not to represent, the representative, a lawyer, was under

a positive duty to withdraw. The Tribunal's powers to investigate and to require post-hearing evidence or submissions could compensate for the absence of representation.

The employer was aware of wrist complaints by the worker but claimed to be unaware that they were work-related or that they were of any serious consequence. The employer was also mistrustful as the worker was being laid off the day after the second alleged accident. The worker's tendonitis of the flexor and extensor tendon was compatible with his history of the two accidents which involved the lifting and slipping of heavy stone slabs. The worker's history of the accidents was consistent and uncontradicted. The employer's appeal of the decision granting the worker benefits for the wrist injury was dismissed. [6 pages]

WCAT Decisions Considered: Decision No. 4 (1986), 1 W.C.A.T.R. 17; Interim Decision No. 24 (1986), 1 W.C.A.T.R. 93

DECISION NO. 745/88 (02/08/90) Carlan Rao Meslin

Penalties (employer out of operation) - Assessment of employer (relief from additional sums) - Board Directives and Guidelines (penalty assessments).

The employer appealed the imposition of a penalty assessment. When the employer was audited by the Board in 1980, it was determined that 40% of its revenues were derived from processing meat and 60% from the resale of pre-processed products. In 1987, the employer's evidence was that 70% of its revenue was derived from products that it processed. The employer had always been assessed as a wholesaler. By 1986, when it was sold and became part of a larger company, the employer had a lifetime deficit of almost \$600,000.

The inability of the employer to establish improved performance because the company was no longer active, was not a reason to rescind the additional assessment. Penalties are issued because of past performance and can only be rescinded if current performance markedly improves. The objective of alleviating the unfair burden on other employers in the class had to be considered as well. Any improvement in accident rates in 1985, was more likely due to the reduced work force than to improved safety standards.

The employer argued that it had been improperly classified as a wholesaler and instead should have been classified as a meat processor, an industry which has a five times higher assessment rate. The Panel noted the timing of the request and that to allow reassessment now, after the company was no longer operating, would defeat the penalty with no possibility of collecting the unpaid premiums. Though one of the reasons for the employer's deficit may have been that its activities were improperly classified, considering the real merits and justice, it would be inequitable to relieve the employer from the penalty. To do so would enhance the unfair burden that this employer, which had not established a sincere concern for worker safety, had placed on the accident fund. The penalty assessment was confirmed. [10 pages]

WCAT Decisions Considered: Decision No. 256/87

Regulations Considered: Reg. 951, s. 6

Board Directives and Guidelines: Additional Assessment Policies and Procedures, Board Minute # 6, January 14, 1975

DECISION NO. 512/90 (02/08/90) Bigras Fox Howes

Disablement (change in work) - Disablement (awkward position) - Tenosynovitis (wrist).

The worker, who was employed on the chicken-cleaning line of a meat processing firm, was entitled to benefits for her left wrist tenosynovitis both under the old and new Board policies relating to disablement.

With respect to the old policy, the worker's condition developed shortly after a job change whereby she performed repetitive tasks which were demanding on her wrist, including a manoeuvre which required awkward movements of the wrist to vacuum the chickens' cavities. The fact that co-workers did not develop a similar

condition was immaterial as, in disablement cases, the worker's condition must be consider in light of her predisposition or peculiarities resulting in injury.

With respect to the new policy, the condition emerged gradually over time, did not result from a prior condition, arose during a period when changes occurred in the work place, and no other causes could be identified. The preponderance of medical opinion supported a causal relationship between the tenosynovitis condition and the work. [5 pages]

Other Decisions Considered: Review of Decision No. 72 (1988), 12 W.C.A.T.R. 85 at 152 (WCB Board of Directors)

DECISION NO. 525/90 (02/08/90) Starkman Hison Jago

Significant contribution (of compensable accident to ongoing condition) - Obesity.

The worker suffered a series of compensable accidents from 1966 to 1975 which involved relatively minor back injuries. In the late 1970s benefits were paid for periods of lost time relating to the earlier accidents. Since 1975, the worker was unable to continue employment as a construction worker.

There was no firm diagnosis of the worker's condition. There was some mild degenerative change and perhaps some scoliosis. The worker was a diabetic and had vascular problems. The examining doctors did not attribute the accident to the work accidents. The worker's obesity was at least partially responsible for his ongoing back pain. The worker did not seek regular medical treatment after the 1975 accident and did not seek treatment for his back throughout the 1980s. The worker was involved in non-compensable motor vehicle accidents in 1973 and 1983. The worker was not entitled to a pension as his ongoing back problems were not causally related to his employment. [7 pages]

DECISION NO. 889/89 (07/08/90) Carlan McCombie Clarke

Medical opinion (patellofemoral joint syndrome) - Patellofemoral joint syndrome.

The worker's job involved the installation of instrument panels in vans. He had to step two and one-half feet up into the vans, while carrying a 30 pound panel, supporting all the weight on his right knee. This process was repeated 12 times per hour.

A medical report related the worker's patellofemoral problems to his work. It stated that the repetitive contact force between the patella and the underlying femoral condyle, at 90 degrees of flexion, would be sufficient to cause the articular cartilage of the patellofemoral joint to break down. The worker was entitled to benefits for his knee condition. [7 pages]

DECISION NO. 364/90 (07/08/90) Hartman Rao Barbeau

Access to worker file, s. 77.

The employer was granted access to the worker's file.

DECISION NO. 941/88 (07/08/90) Carlan Lebert Jago

Board Directives and Guidelines (tinnitus) (severity) - Board Directives and Guidelines (tinnitus) (continuous) - Tinnitus.

The worker appealed a decision denying him entitlement for tinnitus. The Board found that the worker met its policy requirement that the tinnitus exist for two years, but that he did not meet the requirement that it be severe and distressing.

The Panel concluded that the Board had failed to establish objective standards by which to assess the severity of tinnitus. The Panel could not accept the Board's explanation that someone with a constant noise in their ear at the level of a loud conversation (70 decibels) would not be severely affected by the noise. The Board's criteria indicated that it was trying to assess the intrusiveness of the condition in the worker's daily living activities when it assessed severity. The evidence of audiologists can establish the existence of tinnitus, but the evidence of the worker must be relied upon to establish the effects of the tinnitus on daily living.

With respect to the criterion that the tinnitus be continuous, the Panel concluded that if the tinnitus is distressful to the worker on a regular basis, it should be considered continuous, rather than intermittent. The ringing does not have to be heard every moment of the day to be continuous.

The worker's tinnitus had been continuous since 1986. It was severe from that time because it prevented the worker from sleeping properly at night and required him to take afternoon naps, thereby disrupting his daily living activities. The worker was entitled to a 2% pension for tinnitus. [6 pages]

DECISION NO. 563/90I (08/08/90) McIntosh-Janis McCombie Ronson

Adjournment (addition of representative) - Procedure (additional medical evidence).

The worker had planned to represent himself, based on the issues laid out in the Case Description. Three addenda to the Case Description added complex issues and the worker then felt he needed assistance. The addenda were not received by the worker until less than 21 days before the hearing and he did not have time to obtain representation for the hearing. The hearing was adjourned.

Since the most recent medical note on file was from March 1987, and the worker was claiming benefits up to the present, Tribunal Counsel was directed to obtain summaries of treatment rendered from the worker's family doctor and chiropractor. As there was not much medical information on file about the manifestations of psychotraumatic disability noted at HRC, and as chronic pain was also in issue, an assessment of the worker by the Board's multi-disciplinary assessors was directed. [4 pages]

DECISION NO. 923/89 (07/08/90) Carlan Robillard Nipshagen

Delay (reporting injury) - Disablement (nature of work).

The worker was employed for 22 years in a job that required her to cut cloth and remove buttons and zippers by machine. The worker finished her shift on October 23, 1986, but had not returned to work since. She claimed to have experienced an onset of low back pain at that time. Scoliosis was diagnosed.

On October 26 and October 29, 1986 the worker obtained medical treatment, but she did not identify work as a contributing factor. The worker collected unemployment insurance for 15 weeks following her lay-off. She eventually sought the help of a legal aid clinic which assisted her in applying for workers'

compensation. The first documented notice to either the employer or the Board, that the worker was relating her low back pain to her work, was not given until August 1987.

The Panel was not satisfied that the worker suffered an onset of pain at work because of the delay in reporting it to the employer and her failure to identify work as a contributing factor when first obtaining medical treatment. According to the only medical report on point, the work was not a significant contributing factor to the disability. The worker was not entitled to benefits. [5 pages]

DECISION NO. 238/90 (15/08/90) Marafioti McCombie Clarke

Continuity (of treatment) - Continuity (of complaint).

The worker received benefits for a low back strain from January to April of 1976 and for a recurrence in May and June of that year.

The worker was not entitled to benefits for a lay-off in September 1977 as continuity of complaint and continuity of medical treatment had not been established. The worker was able to work from June 1976 to September 1977 without medical treatment. [4 pages]

DECISION NO. 484/90 (15/08/90) Bradbury Fox (dissenting) Barbeau

Exposure (welding fumes).

The worker became a quality control inspector in his employer's welding area in 1976. In 1987 he laid off work with symptoms of headaches, dizziness, nausea, and a plugged nose. He appealed the Board's denial of his claim that these symptoms were the result of exposure to welding fumes and smoke at work.

The majority of the Panel found that there was no causal relationship between the worker's symptoms and his work environment from March 1987 (the date when he first complained to the employer's medical centre of throat irritation) onward. The worker was exposed to smoke and fumes but two independent tests showed that the level of welding fumes was below government standards. On the evidence, the worker did not suffer from occupational asthma or from allergies to welding fumes. Nor, despite the suggestion made by many of the medical specialists, was there evidence that the worker himself was particularly sensitive to the workplace substances. The worker had other conditions which could account for his symptoms, including: anxiety and depression, a deviated septum, high blood pressure (which was not being treated) and hypertension. The evidence indicated that the worker continued to experience symptoms even when he was removed from the work area.

Even if the worker suffered from asthma or allergies, the work environment was not a significant contributing factor to the condition, given that, he had previously held welding jobs and then worked for seven years in his current environment without symptoms, the symptoms continued after workplace improvements and removal from the workplace, and there was a lack of similar symptoms in other workers in the same environment. The appeal was dismissed.

The Worker Member, dissenting, would have allowed the appeal on the basis that the preponderance of the evidence favoured the worker's case. [13 pages]

DECISION NO. 932/89R (17/08/90) Carlan Fox Ronson*Reconsideration.*

The worker's request to reconsider Decision No. 932/89 was denied. The worker's request only restated evidence which was considered by the Panel in the original decision. [3 pages]

WCAT Decisions Considered: 932/89

DECISION NO. 478/90 (17/08/90) Starkman Beattie Preston

Section 15 application - Worker - Employer (definition of) - Independent operator (construction) - Construction - Board Directives and Guidelines (construction industry worker).

The Panel heard an appeal and a s.15 application regarding the applicant's status as a worker. The applicant did roofing work starting in September 1984. In October 1984, he fell from a roof and was injured.

According to Board policy, a subcontractor in the construction industry who employs other workers to assist him in performing the job will be considered to be an employer. The applicant had always worked as an employee previously. However, according to the applicant's arrangement with the contractor, he was to be paid on a square footage basis. This was the basis on which other subcontractors were paid. The applicant supplied tools, including staple guns and scaffolding. He hired other workers to assist him. These arrangements were vague but the Panel was satisfied that he intended to hire workers on a regular basis and to pay them the going rate.

The Panel concluded that the applicant was not a worker. [9 pages]

DECISION NO. 583/90 (20/08/90) Kenny Jackson Clarke

Access to worker file, s. 77 (issue in dispute).

Access to the worker's file was granted to the employer. The issue in dispute was continuing entitlement. The employer argued that the worker prolonged his recovery by failing to follow prescribed treatment. It was not clear how this argument would affect entitlement. However, the Panel was satisfied that the employer genuinely believed that it had a basis for objecting to continuing entitlement and that it had indicated a well-formed intention to do so. [3 pages]

DECISION NO. 384/90I (17/08/90) Moore Fox Jewell

Procedure (absent parties).

The worker was not present at his appeal. His representative indicated that it was her understanding that the worker intended to be present.

An adjournment was granted. The Panel directed the worker's representative to contact the worker and inform the Panel of the reason for the worker's absence. If the worker had a bona fide intention to participate, the appeal would be rescheduled. Otherwise, it would be determined on the basis of documentary evidence and written submissions.

The representative later wrote that the worker had a driving job on the morning of the appeal and got caught in traffic.

The Panel directed that the appeal be rescheduled. [4 pages]

DECISION NO. 299/90 (17/08/90) Lax Robillard Jago

Suitable employment.

The worker appealed a decision of the Hearings Officer granting only 50% benefits from June 1987 to August 1989. In November 1986, the worker was discharged from HRC to permanently modified work. The employer provided modified work within the worker's medical restrictions in January 1985 but the worker did not meet her obligation to reasonable attempt the modified work.

The appeal was dismissed. [6 pages]

DECISION NO. 97/89 (17/08/90) McGrath Robillard Seguin

Aggravation (compensable injury) - Disablement (strenuous work).

The worker appealed a decision of the Appeals Adjudicator denying entitlement for a cervical and shoulder condition in 1984. The worker suffered compensable shoulder and neck injuries in 1974 and 1982. On the evidence, these were minor injuries and did not contribute to the condition in 1984. Further, the worker's job in 1984 was very light in nature and did not contribute to the condition. The appeal was dismissed. [9 pages]

DECISION NO. 134/90R (20/08/90) Bigras Cook Sutherland

Reconsideration.

The employer's request to reconsider Decision No. 134/90 was denied. No new evidence or arguments were presented. [3 pages]

WCAT Decisions Considered: Decision No. 95R (1989), 11 W.C.A.T.R. 1; Decision Nos. 72R, 72R2, 134/90

DECISION NO. 165/90 (20/08/90) Hartman McCombie Meslin

Varicose veins - Thrombosis (superficial venous) - Post-phlebotic syndrome.

The worker appealed a decision of the Hearings Officer denying entitlement subsequent to April 1986. The worker had varicose veins. In January 1985, she struck her foot at work and received benefits until April 1986.

The evidence did not support deep venous thrombosis although there was some evidence of superficial venous thrombosis. One doctor described the worker as having post-phlebotic syndrome. Whether or not the worker had post-phlebotic syndrome, it was clear that by April 1986 she had recovered.

The Panel concluded that the worker was not disabled subsequent to April 1986 as a result of the 1985 accident. Any residual discomfort was due to non-compensable conditions. [7 pages]

DECISION NO. 453/89 (20/08/90) Carlan Heald Jago

Pensions (Rating Schedule) (eye) - Pensions (assessment) (eye) - Pensions (arrears).

The worker suffered an injury in February 1967 when a particle of steel entered his eye. Surgical attempts to remove the particle were unsuccessful. He received temporary benefits until March 1967. Following the accident he wore glasses to correct vision loss, which was assessed as 20/50 unaided and 20/30 with glasses. In 1976, his vision was assessed as 20/200 unaided and 20/30 with glasses. In 1985, it was assessed as 20/200 unaided and 20/40 with glasses. Pursuant to Board policy, the worker was awarded a 1% pension retroactive to 1985. The worker appealed the quantum and retroactivity of the pension.

The worker had a permanent disability resulting from a compensable injury. However, a pension is payable only if there is an impairment of earning capacity. The Board assesses pensions for vision loss after correction with conventional lenses. Vision loss is treated differently than other disabilities, which are assessed before correction. This difference is justified since vision disabilities can be corrected easily and effectively. Further, wearing glasses is very common and is rarely considered a handicap. The other disability which on its face can be easily corrected is hearing loss. However, it appeared that hearing aids were less effective and reliable in removing a handicap than glasses. Since impairment is estimated from the nature and degree of the injury, it is anticipated that different kinds of injuries may be treated differently because of their nature.

The evidence did not support impairment on the basis of the presence of the steel particle or tearing. The Board acted in accordance with its policy and granted a pension dating back to the time the worker's corrected vision deteriorated to 20/40. The appeal was dismissed. [9 pages]

WCAT Decisions considered: Decision No. 915 (1987), 7 W.C.A.T.R. 1; Decision No. 194/89

Board Directives and Guidelines: Claims Adjudication Branch Procedures Manual, Document no. 33-20-01

DECISION NO. 205/89L (20/08/90) Faubert McCombie Ronson

Discretion, Board (supplements, temporary) - Discretion, Board (travel expenses) - Supplements, temporary (partial award) - Travel expenses (job search) - Leave to appeal (good reason to doubt correctness) (discretion, Board).

The worker sought leave to appeal several issues arising from three separate decisions of the Board's Appeal Board.

The worker was awarded a 15% pension and for one year he received a full (85%) temporary supplement. It was then reduced to 35%. One of the issues under consideration was the denial of an upward adjustment of the worker's temporary supplement from 35%.

The Act did not prevent the Board from awarding less than a full supplement, however, the usual practice of the Board was either to pay a full supplement or to deny any entitlement at all, depending on whether or not the worker was co-operating in his rehabilitation. Departure from this practice constituted a good reason to doubt the correctness of the Appeal Board's decision.

The absence of a relevant Board policy was not a bar to the Board exercising its discretion in an individual case. However, in light of the Board's usual practice, the worker was entitled to an explanation as to why an exception was made in this case. Absent such an explanation, the decision to limit the supplement was arbitrary. The Appeal Board's explanation did not establish how it determined that only half benefits were payable, or that the Appeal Board had truly turned its mind to the worker's entitlement to a temporary supplement. Leave to appeal this part of the Appeal Board's decision only was granted.

Leave to appeal the determination that the worker was not entitled to payment for travelling expenses while looking for suitable work, was not granted. Under the Act the Board had a discretion to make expenditures that could lessen any handicap resulting from the worker's injuries. While the Board might possibly rely on that provision of the Act to authorize such a payment, the Board had clearly never adopted this practice in the exercise of its discretion. Nothing required the Board to exercise its discretion in the fashion urged by the worker. The decision of the Appeal Board on this point should not be interfered with. [13 pages]

WCAT Decisions Considered: Decision No. 112 (1986), 3 W.C.A.T.R. 54; Decision No. 131 (1986), 2 W.C.A.T.R. 77; Decision No. 495/88 (1988), 10 W.C.A.T.R. 241

DECISION NO. 346/90 (20/08/90) Lax Nipshagen Fox

Suitable employment - Temporary disability (beyond pension level).

The worker, who was employed in the upholstery industry, suffered a back injury in October 1981, for which he was awarded a 15% pension in October 1982. Except for an attempt at modified employment with another upholstery company in May 1986, the worker has not worked since the accident. Except for a three-month period immediately following this attempt at light work, the worker has consistently received supplementary or other types of benefits in addition to his pension benefits. The worker sought additional benefits for that three-month period as well.

The worker was capable of light work at the time in question. The Panel found that there was suitable work available either with the second employer or the accident employer, which the worker refused to accept. His 15% pension adequately compensated him during that period. The worker was not entitled to any additional benefits. [7 pages]

DECISION NO. 399/90L (21/08/90) Chapnik Robillard Jago

Leave to appeal (substantial new evidence) (subsequent court decision) - Leave to appeal (good reason to doubt correctness) (subsequent court decision) - Legal precedent.

The worker applied for leave to appeal an Appeal Board decision in 1984 which denied continuing benefits for a compensable motor vehicle accident in 1978 subsequent to January 1979. In 1985, the worker was awarded damages in a court action for injuries suffered in a number of other non-compensable motor vehicle accidents.

The judge made several comments about the compensable accident, assessed damages on a global basis including the compensable accident and allocated a portion of the award to the compensable accident, without actually awarding damages for it.

The court decision did not constitute substantial new evidence. The main evidence before the judge was given by a doctor who had a number of comprehensive reports on file with the Board and whose reports were considered by the Appeal Board.

The court decision also was not good reason to doubt the correctness of the Appeal Board decision. Benefits under the workers' compensation scheme are based on different considerations than damages in a court action. The judge's findings represented his opinion and appeared to be obiter with respect to the

compensable accident. In addition, the Tribunal was not required to follow strict legal precedent. There was evidence to support the Appeal Board conclusion.

Leave to appeal was denied. [9 pages]

WCAT Decisions Considered: Decision No. 131 (1986), 2 W.C.A.T.R. 77; Decision No. 109

DECISION NO. 601/90 (22/08/90) McIntosh-Janis Lebert Preston

Withdrawal (of appeal).

The worker was appealing a decision denying entitlement for headaches and high blood pressure which he claimed were related to a compensable accident. The Panel consented to withdrawal of the worker's appeal to allow him to pursue entitlement for chronic pain and psychotraumatic disability at the Board. [3 pages]

DECISION NO. 550/90 (22/08/90) Bigras McCombie Nipshagen

Aggravation (preexisting condition) (disc, degeneration) - Continuing entitlement - Maximal medical rehabilitation.

A teacher appealed a decision of the Hearings Officer denying continuing temporary benefits for a low back injury subsequent to November 1986. The worker suffered the injury in February 1986 when two students collided with her in the schoolyard. Benefits were terminated when she was discharged from HRC to regular employment. In 1989, she was awarded a pension for chronic pain retroactive to July 1987.

The worker suffered a back injury in a non-compensable motor vehicle accident in 1975. This resulted in a marked lumbar disability for at least three years. However, her condition was asymptomatic for five years prior to the compensable accident.

The Panel disagreed with Board doctors who did not find organic symptoms. A CAT scan taken in September 1986 showed considerably more damage than X-rays taken at HRC in August 1986. The opinion of the Board doctors was also based on two assumptions (that the accident was very minor and that classroom teaching was light work) which the Panel did not accept.

The Panel concluded that the worker's condition had not returned to its pre-accident state by November 1986. It was not until October 1987 that it was determined that further treatment could not be offered. This was the first indication that the worker had achieved maximal medical rehabilitation. The worker was entitled to temporary total benefits until that date. [13 pages]

DECISION NO. 409/90 (22/08/90) Lax, Cook Barbeau

Accident (occurrence) - Delay (reporting injury).

The worker appealed a decision of the Hearings Officer denying entitlement for a shoulder condition, which the worker claimed resulted from moving a heavy piece of equipment.

Although there was a delay of about one week in reporting the injury, there was corroborative evidence that the worker lifted the equipment, felt a sharp pain in his shoulder and let the equipment fall to the ground. There was no other credible explanation for the worker's condition. The appeal was allowed. [7 pages]

DECISION NO. 503/90 (22/08/90) Onen Lebert Clarke

Hypertension - Aggravation (preexisting condition) (hypertension) - Consequences of injury (hypertension).

The worker appealed a decision of the Hearings Officer denying entitlement for hypertension. The worker fell 40 feet from a roof onto hot tar. He suffered multiple injuries, including brain damage, multiple fractures and burns.

The worker suffered from hypertension after the accident. There was a history of hypertension in the worker's family but the worker's blood pressure had not been tested prior to the accident. The Panel found that, even if the worker suffered from hypertension prior to the accident, it was not as severe as after the accident. The trauma of the worker's head injury may have triggered an underlying condition. Further, the severe emotional stress of the accident and adjusting to his disabilities may have caused or aggravated the hypertension condition.

It was not necessary to decide whether the head injury alone or the sequelae to the accident by themselves were responsible for the condition. Both theories were reasonably supported by the evidence. The appeal was allowed. [9 pages]

DECISION NO. 865/89R (23/08/90) Carlan Lebert Meslin

Reconsideration.

The worker's request to reconsider Decision No. 865/89 was denied. The worker disagreed with the decision but did not show any significant defect in administrative process or content of the decision. [4 pages]

WCAT Decisions Considered: Decision No. 95R (1989), 11 W.C.A.T.R. 1; Decision Nos. 72R, 72R2, 865/89

DECISION NO. 518/90 (23/08/90) Onen Lebert Barbeau

Out of province - Residence of worker - Place of employment.

The worker appealed a decision of the Hearings Officer denying entitlement for injuries sustained while working in Africa. The worker was a pilot. He entered into short term contracts related to specific projects. He entered into a contract with the employer near Ottawa to work at a project in Africa. He was in Africa on this contract from May to December 1977 and from January to July 1978. He accepted another assignment in Africa from November 1979 to December 1980. He always returned to Ottawa after assignments and during breaks. He would complete paperwork and other business there. He received mail through the employer's office in Ottawa. The worker's parents lived in Nova Scotia and he also owned a house there. When he returned to Canada, he always went to visit his parents. His pay cheque was forwarded to his parents.

Section 6(3) provides for entitlement to benefits for injuries sustained outside Ontario if the following requirements are met: 1) the chief place of business of the employer is in Ontario; 2) the residence of the worker is outside Ontario; 3) the worker's usual and principal place of employment is in Ontario; 4) the worker is injured while out of Ontario for a temporary purpose connected with his employment. The Panel considered whether the worker met the requirements of this section.

1) There was no doubt that the employer's chief place of business was in Ontario.

2) The worker's residence was in Nova Scotia. He owned a house there, although he did not live there at the material time. His family lived there, his financial affairs were centred there and he repeatedly

returned there. It was the most consistent connection for him. His connection to Ontario was predominantly one of employment rather than residence. Although he lived in Africa while on assignment, he did not establish connections there.

3) The worker's usual and principal place of employment was in Ontario. The Panel applied a "sufficient connection" test to make this determination. Although the worker performed the majority of his work functions in Africa, his contract of employment was entered into in Ontario, he was employed under a Canadian pilot's licence, he used equipment provided by the employer, personnel matters including pay were handled from Ottawa and control of the operation in Africa was through Ottawa. Moreover, he was employed on a series of assignments through this employer in a number of different locations.

4) The worker's numerous travels outside Ontario were temporary absences necessary to the performance of the employment contracts. The assignments were always of limited duration which were expected to terminate at a specific time.

The worker met all the criteria of s.6(3) and was therefore entitled to be considered for compensation under the Act. The appeal was allowed. [16 pages]

Board Directives and Guidelines: Claims Services Division Manual, s.6(2), p.57, Directive 1

Cases Considered: British Airways v. WCB (1985), 17 D.L.R. (4th) 36

**DECISION NO. 531/90 (23/08/90) Onen Cook Nipshagen
Sukhdeo v. Nembhard**

*Section 15 application (auto insurance) - In the course of employment (parking lots) -
Arising out of employment (added peril).*

The plaintiff and defendant were involved in a motor vehicle accident in the employer's parking lot prior to commencing their shifts. The plaintiff submitted that he was not in the course of employment since he intended to go to a donut shop prior to starting work. The employer submitted that the risk was of a public nature in this case, that this type of case was more appropriately dealt with under auto insurance and that this was in accord with Board policy that excluded accidents on the employer's premises involving use of instruments of added peril.

The determination of course of employment must be made by considering the strength of the connection between the workers and the employment. In interpreting legislation, there may be room for considering the existence of other compensation schemes in certain circumstances. That could only be considered here if the risk was primarily of a public nature. However, that was not so in this case. An activity such as climbing stairs or driving a car is not inherently public or private. It is the surrounding circumstances that determine the character of the activity. The primary purpose of the parties in the parking lot was employment-related, even if the plaintiff intended to go to the donut shop. Further, use of an automobile in this situation was not an instrument of added peril that would remove the workers from the scope of the Act.

The plaintiff's right of action was taken away. The Tribunal did not have jurisdiction regarding the action of the plaintiff's wife. [11 pages]

WCAT Decisions Considered: Decision No. 547/87 (1988), 8 W.C.A.T.R. 160; Decision No. 674/89

Board Directives and Guidelines: Claims Services Division Manual, s.3(1), p.47, Directive 21

Other Statutes Considered: Family Law Act, 1986, S.O. 1986 c.4, s.61

DECISION NO. 815/89 (23/08/90) Onen Robillard Nipshagen*Delay (onset of symptoms) - Continuing entitlement.*

The worker suffered a shoulder injury in 1977 when he was struck by falling equipment. The worker appealed a decision of the Hearings Officer denying entitlement for a cervical disability and denying entitlement for shoulder surgery in 1985.

On the evidence, the Panel found that the worker was not entitled to benefits for the shoulder surgery in 1985 since it was related either to ageing or to a non-compensable shoulder injury in 1983.

The Panel accepted the worker's evidence that he was struck on the head as well as on the shoulder in 1977 and that he experienced headaches since the accident, although there was no reported medical complaint until 1980. The cervical disability was diagnosed as either spondylosis or a soft tissue injury. Based on either diagnosis, the condition could be related to the compensable accident. The worker was entitled to benefits for the neck condition. [8 pages]

DECISION NO. 504/90 (20/08/90) Bigras McCombie Shuel*Synovitis (foot).*

The worker estimated that he walked 8 to 12 miles per day over a cement floor which often contained substances such as oil. He did so wearing bulky boots made of heavy leather with steel toe protection. Though the medical evidence did not directly relate the condition to the work, the condition was compatible with the considerable walking required and two doctors recommended a change in footwear.

When the worker returned to work, after a lay-off due to the foot condition, he was supplied with a bicycle, soft-leather work boots and less onerous responsibilities. He suffered no further recurrences of the condition.

The worker was entitled to benefits for the foot condition for which the Panel accepted the diagnosis of synovitis in both feet. [7 pages]

DECISION NO. 438/90 (22/08/90) Chapnik Fox Barbeau*Maximal medical rehabilitation - Pensions (assessment) (back).*

The worker suffered a low back injury in July 1982. He received temporary total benefits for various periods to September 1986. A 15% pension was granted in February 1984 and increased to 20% in September 1986, with arrears to May 1986. The worker received an older worker supplement for 18 months from October 1986. He was appealing a decision denying him entitlement to temporary total benefits for the period from September 1986 to January 1988. The worker retired in January 1988, two months before his 65th birthday.

By the time of the September 1986 assessment, the worker had reached maximal medical rehabilitation. The doctor concluded that the worker was incapable of working, particularly at his heavy job as a welder. The worker was not receiving ongoing, active, treatment for his back at the time of the assessment.

Though the Panel accepted that the worker was incapable of work during the period in question, that did not mean his pension rate was too low having regard to the benchmarks established by the Rating Schedule. Moreover there were non-compensable factors contributing to the worker's low back disability, such as his age, diffuse osteoporosis, and an intervening fall. The worker's appeal was dismissed. [8 pages]

WCAT Decisions Considered: Decision No. 915 (1987), 7 W.C.A.T.R. 1; Decision No. 407/88 (1989), 12 W.C.A.T.R. 30

DECISION NO. 347/90 (22/08/90) Faubert Ferrari Apsey*Continuity (of treatment) - Intervening causes.*

The worker injured his low back at work in 1972 and remained unemployed until 1980. He received temporary disability benefits at various times throughout this period. In 1981 he was granted a 10% pension. In August 1986, while bending down to pick up a pair of pants at home, he suffered an onset of back pain which caused him to lay off work.

The worker did not receive medical attention for his low back between 1980 and August 1986. However, the Panel was of the view that the existence of a permanent disability award suggests that a worker has been left with an impairment as a result of a work-related injury which is not expected to resolve. The Panel accepted that the worker continued to have ongoing back symptoms between 1980 and 1986, but had finally resolved to cope with his back condition and return to work. The fact that the worker returned to work in August 1988 suggested that the worker had developed a different pattern of response to his low back condition.

The worker's condition thus continued to be vulnerable as a result of the 1972 accident. The 1986 home lifting incident was trivial, involving an ordinary, regularly-performed motion. It did not break the chain of causation. The worker was entitled to temporary total disability benefits subsequent to August 1986. [10 pages]

WCAT Decisions Considered: Decision No. 582

DECISION NO. 79/90 (23/08/90) Signoroni Cook Meslin*Industrial disease (poisoning) (lead) - Exposure (lead) - Presumptions (section 122) - Asthma.*

The worker was a tube mill assistant for a manufacturer of metal tubing for about 14 months. The worker appealed a decision of the Hearings Officer granting benefits for a lead toxicity condition only to July 1982 and denying entitlement for asthma.

The worker was not entitled to benefits for asthma since there was a lack of evidence of exposure to a sensitizing agent and the asthma symptoms continued well after he ceased employment with the lead exposure employer.

It was undisputed that the work environment contained airborne lead. The worker's symptoms included anorexia, sore eyes, headaches, fatigue and nervous tension. The Board discontinued benefits on the basis that laboratory findings did not demonstrate a continuing disability. However, the worker continued to experience symptoms of lead poisoning.

The only objective measurement of lead poisoning appeared to be blood lead levels. This measurement was not truly reliable nor did it necessarily reflect actual disability. Since lead leaches out of the bones, where the bulk of the total body burden is stored, and does so erratically, the fact that blood lead levels have returned to a safe level is not a guarantee that levels will not return to high levels, even in the absence of further exposure.

Poisoning and its sequelae by lead is listed in Schedule 3. If the worker was disabled by lead poisoning or the sequelae of lead poisoning, the presumption in s.122(9) would apply that the disease was due to the nature of employment. There was a suggestion through the medical reports that there may be a psychological element to the worker's condition. If so, this would be a sequela of the lead poisoning.

The Panel found that the worker was disabled subsequent to July 1982 either by lead poisoning or by the sequelae of lead poisoning and that the worker was entitled to benefits for this condition. The appeal was allowed in part. [18 pages]

Regulations Considered: Reg. 951, Schedule 3

Other Statutes Considered: Occupational Health and Safety Act, R.S.O. 1980 c.321, O.Reg. 538/81

DECISION NO. 609/90 (28/08/90) Bradbury Cook Meslin

Subsequent incidents (outside work).

The worker suffered a neck strain in March 1987, for which he received benefits for four short periods until July 1987. The worker was not entitled to benefits for two days in March 1988 after an incident at home when he was pulling on his socks, considering lack of continuity of symptoms and the worker's ability to return to heavy work after the 1987 accident. [4 pages]

DECISION NO. 543/90 (28/08/90) Bigras Lebert Preston

In the course of employment (parking lots).

The worker appealed a decision of the Hearings Officer denying entitlement for a back injury which the worker suffered when she fell on ice in a parking lot. To get from the parking lot to the employer's premises, the worker had to walk around a building and cross a street. The employer rented spaces in the parking lot from the owner of the lot and collected half the cost from employees who wanted to park there. The worker did not arrange with the employer for a parking spot but parked there on a regular basis anyway.

The Panel found that the accident did not occur in the course of employment. The parking lot was not owned or controlled by the employer. The worker did not make arrangements with the employer. There was no implicit right to park in that location. The appeal was dismissed. [8 pages]

WCAT Decisions Considered: Decision No. 536 (1987), 6 W.C.A.T.R. 59; Decision No. 369/87 (1987), 6 W.C.A.T.R. 113; Decision No. 1226/87

Board Directives and Guidelines: Claims Services Division Manual, s.3(1), p.47, Directive 21

DECISION NO. 108/90 (28/08/90) Hartman Fox Nipshagen

Subsequent incidents (outside work).

The worker suffered low back pain at work in 1979. The worker was not entitled to benefits for an incident at home in 1983. The incident in 1979 was an aggravation of a pre-existing back condition. The 1979 injury was at a site different than the site of the 1983 complaint. Medical evidence did not support entitlement. [6 pages]

DECISION NO. 810/89 (28/08/90) Moore Klym Jewell

Consequences of injury (altered gait).

The worker suffered a compound fracture of his right leg, for which he received benefits. The worker appealed a decision of the Hearings Officer denying entitlement for a left knee disability.

The worker favoured his right leg after the accident. This was supported by medical evidence of the continued presence of osteoporosis in the right knee. The Panel found that the left knee condition was related to altered gait resulting from the accident. The appeal was allowed. [8 pages]

DECISION NO. 967/89 (28/08/90) Faubert Heard Nipshagen

Parties (of record) - Out of province - Abuse of process - Estoppel - Aggravation (preexisting condition) (degeneration) (knee).

The worker appealed a decision of the Hearings Officer granting benefits for a knee disability from December 1982 to August 1983 but denying benefits thereafter.

The worker was hired by company A. There was a dispute whether all the rights and obligations of company A were assigned to company B. Notice of the appeal was given to both companies. However, there was still an issue as to which company was the party of record. Company B did not appear at the hearing and the worker did not object to the Panel receiving submissions from company A. Any issue of allocation of responsibility could be taken up with the Board.

The worker sustained a knee injury in 1982 while working on board a ship in San Francisco harbour. Since the ship was registered in Canada and the worker was resident in Ontario, the worker came within s.6(6) and would be covered by the Act.

The worker applied to, and was awarded benefits by, the Merchant Seamen Compensation Board. The Panel did not have discretion to refuse jurisdiction on this basis. Entitlement to workers' compensation benefits arises when the statutory requirements of the Act have been met. In any event, there was no abuse of process by the worker. Rather, the multiple claims indicated confusion as to the appropriate forum. In addition, the doctrine of res judicata did not apply. The determinations could not be said to be identical since they involved the application of different statutory provisions to the same facts.

The worker had a preexisting non-compensable knee condition, for which he underwent a meniscectomy. However, the condition had not been disabling from 1972 until the accident in October 1982. Following the accident, the worker had surgery in December 1982 for anterior cruciate replacement. After another accident in 1984 and continuing problems, the worker underwent a knee fusion in 1986.

The Panel found that, although the worker may have had anterior cruciate damage prior to the 1982 accident, the worker's knee disability was hastened by the accident. The accident aggravated a severe preexisting but asymptomatic condition. Prior to the accident, the worker led a productive and active lifestyle. After the accident, his condition underwent a rapid and steady decline.

The appeal was allowed. Since the worker's condition was symptom-free at the time of the accident, there should be no limitation of benefits. [19 pages]

WCAT Decisions Considered: Decision No. 355/88 (1989), 10 W.C.A.T.R. 194; Decision No. 580/87

Other Statutes Considered: Merchant Seamen Compensation Act, R.S.C. 1985 c. M-6, s. 5(a)

Board Directives and Guidelines: Claims Adjudication Branch Procedures Manual, Document no. 33-02-20

DECISION NO. 196/90 (29/08/90) Hartman Fox Seguin*Supplements, older worker (age).*

The worker suffered a back injury in 1977, for which he was awarded a pension and a temporary supplement. The worker appealed a decision of the Hearings Officer denying an older worker supplement from March 1985 when the temporary supplement was discontinued. At that time the worker was 51 years old.

The fact that the worker was not 55 years old in 1985 was not critical to the decision. It was only necessary that age be a significant contributing factor to the worker's inability to return to work. However, in this case, age was not a factor. Rather, it was the worker's perception that he was totally disabled and lack of motivation that were the significant factors. The appeal was dismissed. [8 pages]

WCAT Decisions Considered: Decision No. 320/88 (1988), 9 W.C.A.T.R. 292; Decision No. 737/88 (1988), 10 W.C.A.T.R. 318; Decision No. 378/89 (1989), 11 W.C.A.T.R. 345; Decision No. 729/89 (1989), 12 W.C.A.T.R. 251; Decision No. 746/89
Board Directives and Guidelines: Claims Adjudication Branch Procedures Manual, Document no. 33-20-17

DECISION NO. 148/90 (29/08/90) Hartman Rao Meslin*Suitable employment.*

The worker suffered a back injury in September 1985 for which he was awarded a pension. The worker appealed a decision of the Hearings Officer denying temporary benefits or a pension supplement subsequent to September 1986.

On the evidence, the worker was only partially disabled subsequent to September 1986. Even if he was disabled beyond his pension level, he was capable of suitable modified work. The employer offered suitable work at no wage loss, which was rejected by the worker. The appeal was dismissed. [11 pages]

DECISION NO. 470 (29/08/90) Faubert Robillard Jewell*Rheumatoid arthritis - Medical opinion (rheumatoid arthritis).*

The worker suffered a right arm and shoulder injury in May 1973 when he was struck by sheets of gyprock. He continued working until August 1973, using his left hand to compensate for his right arm problems. The worker appealed a decision of the WCB Appeal Board, which granted benefits for rheumatoid arthritis in the right arm and left hand but denied benefits for generalized rheumatoid arthritis.

There were competing theories in the medical literature regarding the relationship between trauma and rheumatoid arthritis. The Panel accepted clinical observations from a number of doctors that physical trauma can in some cases precipitate the onset of rheumatoid arthritis, including the onset of symptoms at sites remote from the area of injury.

In this case, considering the nature of the trauma, the absence of preexisting symptoms and the rapid progression of the disease, the worker's entitlement should not be restricted to the limbs directly affected by the injury. It was not necessary to determine whether the accident caused or merely aggravated an underlying condition. Since the worker was asymptomatic prior to the accident, there would be no limitation of benefits in any event.

The appeal was allowed. [16 pages]

WCAT Decisions Considered: 470L, 936/87, 982/87
Board Directives and Guidelines: Claims Services Division Manual, s.108(2), p.235, Directive 1

DECISION NO. 938/89 (30/08/90) Chapnik Drennan Meslin*Continuing entitlement.*

The worker received benefits for a few weeks in January and February of 1979 for a cut right index finger which became infected. His job involved dipping his hands alternately in very hot and very cold water. The worker began to complain of right hand problems including loss of sensation in some fingers, with pain radiating to the shoulder when the hand was immersed in cold water. The worker sought continuing benefits for the period from August 1979 to August 1980.

Several doctors who examined the worker at the relevant time found no abnormality in the hand. Doctors who examined the worker several years later, did find some abnormality, but they seemed to relate to an overall abnormality in both of the worker's hands. None of the doctors was able to definitively relate the worker's condition to the compensable accident. The worker suffered from non-compensable kidney problems and high cholesterol which could account for some of his symptoms.

The worker was not entitled to continuing benefits. [7 pages]

DECISION NO. 915/89R (30/08/90) Carlan Robillard Howes*Reconsideration - Continuing entitlement - Medical report (opinion of Board doctor preferred).*

The worker's request for reconsideration of Decision No. 915/89 was denied. The worker was unhappy with the Panel's acceptance of the Board doctor's opinion (which stated that it was unlikely that the worker's degenerative disc disease was a consequence of the compensable accident) over that of his family doctor (which did attribute the degenerative changes to the work accident).

The Panel chose not to rely on the family doctor's opinion because he did not address the worker's return to work, which indicated to the Panel that the period of aggravation of the worker's condition caused by the work accident had ended. The worker's subsequent back pain reflected re-aggravations of the underlying non-compensable condition, rather than aggravations of the compensable accident. The worker thus was not entitled to ongoing benefits. [4 pages]

DECISION NO. 385/90 (30/08/90) Chapnik Higson Meslin*Disability (disabled from working) - Rehabilitation, vocational (cooperation) - Chronic pain.*

The worker, a seamstress, suffered myofascial strain and soft tissue injuries as a result of a fall down stairs. She received benefits from February to September 1980. The preponderance of medical evidence did not support the worker's claim that her condition was disabling beyond that period. No significant organic component was identified.

Undefined mentions of chronic pain, without supporting documentation or testing, were insufficient to characterize the worker as disabled from participating in the work force.

Even if the worker were found to be partially disabled due to chronic pain, she would not be entitled to benefits. By making no effort to obtain available employment, the worker had, in effect, totally removed herself from the work force. [6 pages]

DECISION NO. 262/90R (31/08/90) Bradbury Klym Apsey*Reconsideration.*

The worker's request to reconsider Decision No. 262/90 was denied. The Panel reviewed the sections of the Act the legislative framework that applied to the case. The fact that the worker disagreed with the Panel's interpretation was not reason to reconsider. [3 pages]

WCAT Decisions Considered: Decision No. 95R (1989), 11 W.C.A.T.R. 1; Decision No. 262/90

DECISION NO. 1038/89 (31/08/90) Carlan Lebert Ronson*Accident (occurrence).*

The worker appealed a decision of the Hearings Officer denying entitlement for a foot condition.

The Panel was not satisfied that an accident occurred, considering delay in seeking treatment and delay in reporting the injury to the Board. The appeal was dismissed. [5 pages]

DECISION NO. 607/90 (31/08/90) Strachan Lebert Barbeau*Second Injury and Enhancement Fund.*

The employer appealed a decision of the Hearings Officer limiting SIEF relief to 50%.

The worker suffered a back strain while pushing three or four boxes, each weighing between 10 and 14 pounds, across a smooth floor. The Panel found that the accident was minor.

The worker suffered from minor preexisting degenerative disc disease. In addition, there were psychogenic factors, such as personality style and heightened sensitivity to pain, which pre-dated the accident. The worker was markedly overweight. The death of the worker's mother also had a significant effect. The combined severity of these preexisting conditions was moderate.

The employer was entitled to 75% SIEF relief. [8 pages]

DECISION NO. 610/90 (31/08/90) Strachan Higson Barbeau*Exposure (chemicals) - Travel expenses (to hearing).*

The employer appealed a decision of the Hearings Officer granting entitlement for a disability resulting from exposure to chemical fumes. The worker was a typesetter. On her first day of employment with a new employer in the production area, she became ill and experienced headaches, sleepiness and nausea. When she felt ill the next day, she was given a difference office and experienced no ill effects. A year later, she was moved back into the production area and began to experience similar symptoms.

On the evidence, especially the temporal relationship, the Panel found that the worker was entitled to benefits. The worker had an unusual sensitivity to the chemicals involved. Her symptoms were triggered by exposure to these chemicals together with a limited venting system.

The worker received benefits for 18 months while not looking for other employment but while waiting for results from Ministry of Labour tests. The Panel recommended that the Board consider some form of relief for the employer.

The worker travelled from Calgary for the hearing. Her testimony was of significant assistance to the Panel. The Panel granted travel expenses from Calgary and not merely from the Manitoba border.

The appeal was dismissed. [9 pages]

DECISION NO. 252/90 (23/08/90) Signoroni Cook Howes

Continuing entitlement.

The worker suffered a back and buttocks injury when she fell in April 1984. She attempted to resume employment in October 1985 but laid off after only a few hours due to pain. The worker appealed a decision of the Hearings Officer denying benefits subsequent to October 1985.

The Panel could not accept that her work in October 1985 could have worsened any organic injury that the worker may have had. The medical evidence did not support entitlement. The appeal was dismissed. [9 pages]

DECISION NO. 434/90 (31/08/90) McGrath Cook Preston

Access to worker file, s. 77 (issue in dispute).

Access to the worker's file was granted to the employer.

The employer was disputing the use of a 3% Devitt's chart in calculating the worker's pension. The employer submitted that delay on the part of the Board resulted in the use of the 3% chart in 1987 rather than the 7% chart which would have applied in 1983.

The use of the Devitt's chart was a legal and policy issue which would not require access to medical documents. However, the Board decision referred to various medical documents in support of its contention that there was no pensionable disability in 1983 and the documents were relevant to this part of the issue in dispute. [4 pages]

DECISION NO. 435/90 (31/08/90) McGrath Cook Preston

Access to worker file, s. 77.

Access to the worker's file was granted to the employer. [3 pages]

DECISION NO. 433/90 (31/08/90) McGrath Cook Preston

Access to worker file, s. 77.

Access to the worker's file was granted to the employer. [3 pages]

DECISION NO. 590/90 (04/09/90) McGrath Higson Preston

Access to worker file, s. 77.

Access to the worker's file was granted to the employer. [3 pages]

DECISION NO. 592/90 (04/09/90) McGrath Higson Preston

Access to worker file, s. 77.

Access to the worker's file was granted to the employer. [3 pages]

DECISION NO. 593/90 (04/09/90) McGrath Higson Preston

Access to worker file, s. 77.

Access to the worker's file was granted to the employer. [3 pages]

DECISION NO. 591/90 (04/09/90) McGrath Higson Preston

Access to worker file, s. 77.

Access to the worker's file was granted to the employer. [4 pages]

DECISION NO. 436/90 (04/09/90) McGrath Fox Nipshagen

Access to worker file, s. 77 - Procedure (absent parties).

In a s.77 appeal by the worker, the Panel proceeded in the worker's absence. The Panel ruled that it would accept written submissions from the worker if she had valid reasons for not appearing.

Access to the worker's file was granted to the employer. [4 pages]

DECISION NO. 786/89R (31/08/90) Stewart Beattie Apsey

Reconsideration.

The worker's request to reconsider Decision No. 786/89 was denied. In that decision the Panel granted entitlement but limited benefits to two weeks.

The worker submitted a new medical report. A prior report by the same doctor was before the Panel. The doctor's reports made no reference to the fact that the worker had preexisting problems. Sufficient reason to reconsider was not established. [3 pages]

WCAT Decisions Considered: 786/89

DECISION NO. 544/89 (04/09/90) Bradbury Heard Preston

Heart attack - Presumptions (section 3).

A 39 year old carpet installer appealed a decision of the Hearings Officer denying entitlement for a heart attack. On the day the heart attack occurred, the worker and a co-worker unloaded three rolls of

carpeting each weighing 100 to 125 pounds. They had to carry the carpeting a greater distance than usual. To install the carpet, the worker spent several hours hammering spikes into concrete stairways. While carrying some carpet up stairs, a piece of the carpet became stuck. The worker wrenched it free and experienced an immediate onset of pain.

The Panel found that the presumption in s.3(3) did not apply in this case since all the essential facts about how the injury was related to employment and about the cause of the injury were known. The presumption was intended to apply to questions of fact, not questions of law.

The worker had none of the traditional risk factors associated with heart attacks. The Panel accepted the opinion of a s.86h assessor that it would be extremely unlikely for the heart attack to occur without underlying coronary artery disease and that the disease itself was not work-related. The worker was engaged in heavier work than usual and suffered an immediate onset of pain after the forceful isometric exercise of wrenching the carpet. The Panel concluded that work was a contributing factor. The heart attack arose out of employment. The appeal was allowed. [9 pages]

WCAT Decisions Considered: Decision No. 42/89 (1989), 12 W.C.A.T.R. 85

Cases Considered: Review of Decision No. 72 (1988), 12 W.C.A.T.R. 85 at 152 (WCB Bd. of Directors)

DECISION NO. 381/87R (05/09/90) Moore Fox Jewell

Reconsideration.

The worker's request to reconsider Decision No. 381/87 was denied. In the decision, benefits for a respiratory condition were denied since the evidence did not establish that the condition resulted from work. A new medical report submitted by the worker did not persuade the Panel that there was anything incorrect or flawed about the decision. [4 pages]

WCAT Decisions Considered: Decision No. 95R (1989), 11 W.C.A.T.R. 1; Decision Nos. 72R, 72R2, 381/87

DECISION NO. 266/90 (05/09/90) Carlan Beattie Preston

Availability for employment (job search).

The worker suffered a wrist injury in 1982. He appealed a decision of the Hearings Officer denying full benefits from April 1988 to September 1988.

On the evidence, the worker was partially disabled during the period in question and his ongoing problems were permanent. He made no independent efforts to find suitable work and found reasons not to accept jobs offered by the accident employer. The appeal was dismissed. [5 pages]

DECISION NO. 471/90 (06/09/90) Onen Lebert Jewell Bradley v. Robertson; Mulvey v. Bradley

Section 15 application - In the course of employment (proceeding to and from work).

The driver and two passengers of a van were involved in single vehicle accident. They all worked for a construction business and were returning from a job site at the end of the day in a van owned by the business when the accident occurred. The passengers brought an action against the driver and the owner of the business. The driver also brought an action against the owner.

On the evidence, the driver or the owner regularly provided transportation to the workers to and from work sites. However, they were not paid for travel time and were under no obligation to accept the ride. At the time of the accident, they were subject to the risks of the public highway. The Panel found that the passengers were not in the course of employment at the time of the accident. Their right of action was not taken away.

The driver regularly drove the van in which the accident occurred and usually kept it overnight at his home. However, he was not paid for driving the van and was under no obligation to either drive the van or pick up other labourers. The Panel found that the driver was not in the course of employment at the time of the accident. His right of action was not taken away. [9 pages]

WCAT Decisions Considered: Decision No. 229 (1986) 2 W.C.A.T.R. 118

DECISION NO. 717/89 (06/09/90) Hartman Higson Nipshagen

Continuing entitlement - Psychotraumatic disability.

The worker suffered a head injury in 1969. He received temporary benefits for various periods. In 1977, he was awarded a 10% provisional pension for psychotraumatic disability. The worker appealed denial continuing temporary disability benefits and denial of a further pension for psychotraumatic disability.

The worker was not entitled to continuing temporary benefits for headaches. He suffered from headaches prior to the accident. It was probable that the headaches after 1969 were a reflection of a symptomatic preexisting non-compensable condition rather than a result of the accident. The worker was also not entitled to a further pension for psychotraumatic disability. The psychiatric problems were not related to the accident. Rather, they were a revelation of his personality.

The appeal was dismissed. [7 pages]

WCAT Decisions Considered: 717/89L

DECISION NO. 293/89 (06/09/90) Carlan Robillard Jago (dissenting)

Aggravation (preexisting condition) (spondylolysis) - Pensions (assessment) (back) - Supplements, temporary.

The worker suffered a back injury in 1976, for which she was awarded a 10% pension in 1977, increased to 15% in 1982. The worker appealed denial of a temporary supplement subsequent to 1982. The employer appealed the pension level.

The majority of the Panel found that the worker's 15% pension should be confirmed. On the evidence, the worker had preexisting spondylolysis and spondylolisthesis. These conditions were aggravated by the compensable accident. The majority accepted medical evidence that most patients with this condition never have pain resulting from it. In some patients an initial episode of pain follows a definite injury. However, a few patients go on to develop chronic pain after an injury which aggravated the preexisting instability. The majority found that the worker was one of these unusual cases and that there was a significant organic source for the worker's disability. Due to the difficulty in understanding the difference between a 10% and a 15% pension, the majority accepted the 15% assessment of the Board.

The Panel found that the worker was not entitled to a supplement since she did not make a conscientious effort to secure employment.

The appeals were dismissed. [11 pages]

Note: The dissenting opinion of the Employer Member will be released at a later date.

WCAT Decisions Considered: Decision No. 915 (1987), 7 W.C.A.T.R. 1

DECISION NO. 428/89 (30/08/90) Faubert Drennan Nipshagen

Jurisdiction, Tribunal (final decision of Board) - Continuing entitlement.

The worker appealed a decision of the WCB Appeal Board which denied him ongoing entitlement to benefits after June 1981.

The worker suffered three compensable accidents. In February 1974 he suffered a lumbar strain. In November 1974 he fell onto a concrete floor from a height of 12 to 20 feet, injuring his shoulder and ribs. In April 1981 he fell on his back and shoulder and he received benefits to June 1981.

As the worker attributed his back problems to the November 1974 and 1981 accidents, the role of the February 1974 accident was never really an issue before the Appeal Board. The Panel nevertheless concluded that it had jurisdiction to consider the residual effects of the February 1974 accident as well. The Appeals Adjudicator had reviewed in detail the sequence of injuries sustained by the worker. The effect of the February 1974 incident was an issue that was implicitly present in the Appeal Board's decision. The Appeal Board had before it all the relevant evidence concerning the February 1974 incident on which it could have made a specific finding, had it so chosen.

Contrary to the opinion of the Board doctor, which was accepted by the Appeal Board, the Panel found that the worker did suffer a back injury in November 1984 and that the 1981 injury was not an aggravation of an underlying degenerative low back condition. The Panel found no continuing disability as a result of the November 1974 accident. After the 1981 accident, however, the worker received regular treatment for his low back. He only returned to light duties and laid off when they were no longer available. The worker was entitled to continuing benefits as a result of the 1981 accident. [12 pages]

WCAT Decisions Considered: Pension Assessment Appeals Leading Case Interim Report (1986), 7 W.C.A.T.R. 365

DECISION NO. 442/89 (06/09/90) Kenny Fox Nipshagen

Rehabilitation, vocational (cooperation) - Suitable employment.

The worker, a punch press operator, fractured his wrist in December 1985. He returned to his regular work in January 1986, but had to lay off two weeks later due to the increased pain in his wrist. He had not returned to work since that time. The employer claimed that the worker was not entitled to benefits for the period from April 1986 to April 1987.

The Panel found that the worker was unable to do his regular job when he returned to work in January 1986. Throughout the period in question, the worker's doctors advised that he could not do his usual work, but he could do light work. The worker thus remained temporarily partially disabled.

The worker likely could have performed many jobs and could have made more effort to find employment. However, he was active with the Board's rehabilitation division and the Board was satisfied with his co-operation. He therefore did not fail to co-operate in a rehabilitation program within the meaning of s. 40(2)(b). Moreover, no suitable employment was available to the worker. His regular job was not "light" and, in any event, the employer had laid the worker off from that job and failed to make modified employment available. The employer's appeal was dismissed. [8 pages]

DECISION NO. 587/90 (10/09/90) Robeson Lebert Barbeau

Access to worker file, s. 77.

Access to the worker's file was granted to the employer. [3 pages]

DECISION NO. 589/90 (10/09/90) Robeson Lebert Barbeau

Access to worker file, s. 77.

Access to the worker's file was granted to the employer. [3 pages]

DECISION NO. 586/90 (10/09/90) Robeson Lebert Barbeau

Access to worker file, s. 77.

Access to the worker's file was granted to the employer. [3 pages]

DECISION NO. 545/90 (10/09/90) Robeson Robillard Meslin

Access to worker file, s. 77.

Access to the worker's file was granted to the employer. [3 pages]

DECISION NO. 546/90 (10/09/90) Robeson Robillard Meslin

Access to worker file, s. 77.

Access to the worker's file was granted to the employer. [3 pages]

DECISION NO. 548/90 (10/09/90) Robeson Robillard Meslin

Access to worker file, s. 77 (deletion of material).

The employer appealed a decision of the Board to withhold access to some documents. The Panel reviewed the documents and found that the documents withheld were not relevant to the issue in dispute. The appeal was dismissed. [3 pages]

DECISION NO. 569/90 (10/09/90) Hartman Lebert Jago

Access to worker file, s. 77 (issue in dispute).

Access to the worker's file was denied. There was some confusion in the file and there was not a clearly defined issue in dispute. [4 pages]

WCAT Decisions Considered: 474/87

DECISION NO. 606/90 (10/09/90) Hartman Cook Meslin

Access to worker file, s. 77.

Access to the worker's file was granted to the employer. [3 pages]

DECISION NO. 403/89 (10/09/90) Kenny Lebert Jewell

Accident (occurrence).

The worker appealed a decision of the Hearings Officer denying entitlement for a low back disability. On the evidence, the Panel found that an accident did occur in August 1983. However, the condition resolved within a day or two. The worker was not entitled to benefits for surgery in February 1984 for a protruding disc. The subsequent disability and surgery was likely related to progression of an underlying back condition. The appeal was dismissed. [8 pages]

DECISION NO. 511/90I (10/09/90) Starkman Jackson Barbeau

Adjournment (additional evidence).

The worker requested an adjournment for clarification of an audiological report ordered by the Tribunal. The employer had no strong objection and suggested that an opinion from another doctor also be obtained. The adjournment was granted. [3 pages]

DECISION NO. 574/90 (10/09/90) Hartman McCombie Preston

Commutation (relocation).

The worker appealed a decision of the Hearings Officer denying commutation of his pension, valued at about \$45,000. The worker came to Canada from Malta in 1956. He suffered a back injury in 1981. The worker wanted the commutation in order to return to Malta. He would invest the pension, live off the interest and use the pension to set up a business should a suitable business prospect arise.

The worker's request did not meet the requirements of the Board policy. There was no evidence that the commutation would reduce the effects of his disability or that his present financial situation was producing a disability that prevented him from obtaining employment. The appeal was dismissed. [6 pages]

WCAT Decisions Considered: Decision No. 915 (1987), 7 W.C.A.T.R. 1

Board Directives and Guidelines: Guidelines for the Commutation of Pensions, Board Minute 3, March 20, 1989, p.71

DECISION NO. 472/90 (10/09/90) Hartman Rao Jago

Accident (occurrence) - Delay (reporting injury).

The worker appealed a decision of the Hearings Officer denying entitlement for a back injury. The worker was a probationary employee. He claimed that he suffered a back injury on September 18, 1988, when

a fast moving conveyor suddenly started up, causing him to fall backwards. On October 3, 1988, the worker's employment was terminated. He did not report the injury until October 4.

The Panel found that the worker's injury was compatible with the mechanics of the accident as described by the worker. The Panel accepted that the worker did not report the accident out of concern for his job. In addition, the circumstances of the termination led the worker to believe that the accident was the reason for termination. The Panel could not draw negative inferences against the worker for failing to report the accident on October 3.

The worker suffered an accident arising out of and in the course of employment. The appeal was allowed. The matter was referred to the Board for determination of entitlement, if any. [7 pages]

DECISION NO. 532/90 (10/09/90) Chapnik Lebert Preston
Colard v. Lemieux

*Section 15 application - In the course of employment (reasonably incidental activity test) -
In the course of employment (travelling) - In the course of employment (proceeding to and from work).*

The plaintiff in a civil case applied to determine whether her right of action was taken away. The issue was whether the defendant was in the course of employment at the time of a motor vehicle accident.

The defendant was a salesman who was on the road about 75% of his working days. He had arranged a sale and was on his way home at about 3:30 in the afternoon. The transaction still had to be authorized by his boss. The defendant was in daily contact with his superiors and routinely called in to report and get messages at the end of the day, often from home.

The Panel found that the defendant had not completed his work activities at the time of the accident. The essential nature of his activity at the time of the accident was, therefore, reasonably incidental to his employment. The defendant was in the course of employment. The plaintiff's right of action was taken away. [10 pages]

WCAT Decisions Considered: 636/88, 372/89

Board Directives and Guidelines: Claims Adjudication Branch Procedures Manual, Document nos. 33-05-07, 33-14-03;
Claims Services Division Manual, s.3(1), p.50, Directive 22

DECISION NO. 398/90 (10/09/90) Chapnik Cook Kowalishin

Delay (onset of symptoms) - Health care (chiropractic).

The worker appealed a decision of the Hearings Officer denying initial entitlement to health care benefits for a low back disability. The worker was a teacher who suffered nose, ankle and buttocks injuries when she was struck by a student on a bicycle in June 1985. The Hearings Officer found that there was a delay in onset of back symptoms until July 1985.

On the evidence, the Panel found that the worker experienced a dull ache in her back from the time of the accident and that her condition began to worsen in July. The worker's back condition was compensable and she was entitled to benefits.

The worker began chiropractic treatments in October 1985. Despite continuous pressure and some acute episodes, the worker was able to continue teaching. The chiropractic treatments helped to control the symptoms and allowed her to continue working. The worker was entitled to chiropractic treatment for the acute and supportive periods of her back disability.

The appeal was allowed. [10 pages]

WCAT Decisions Considered: Decision No. 4/89 (1989), 11 W.C.A.T.R. 226; Decision No. 998/89
Board Directives and Guidelines: Claims Adjudication Branch Procedures Manual, Document no. 33-32-13;
Operational Policy Manual, Document no. 06-02-03

DECISION NO. 823/89 (11/09/90) Hartman McCombie Jago
Trustees of Ottawa Civic Hospital v. Spencer

Section 15 application (remoteness).

The defendant in a civil action applied to determine whether the plaintiff's right of action was taken away. The plaintiff went to the defendant hospital to oversee some work. After completing that work, he walked down the ramp to the hospital's parking lot when the garage door descended and struck him on the head.

The hospital contracted out the operation of the parking garage to a parking service contractor. This contractor was responsible for the overall maintenance and operation of the garage. The only hospital employee who could possibly be considered to be in the course of employment at the time of the accident was the hospital's supervisor of parking operations. However, his duties were basically to oversee the administrative aspects of the contracting out of the parking operations. By terms of the agreement between the hospital and the parking contractor, it appeared that the parking contractor had assumed primary responsibility for maintenance of safety and access. The hospital employee's involvement was tangential and remote. It was not sufficient to make him a worker in the course of employment in the sense intended by s.8(9).

The plaintiff's right of action was not taken away. [12 pages]

WCAT Decisions Considered: 964/87, 882/88

DECISION NO. 833/89 (11/09/90) Kenny Fox Clarke

Aggravation (preexisting condition) (degeneration) (knee).

The worker appealed a decision of the Appeals Adjudicator denying entitlement for a knee disability. On the evidence, the Panel found that the worker did suffer a knee injury in March 1982. The worker had a preexisting knee condition. Although the worker's knee was painful on the day of the accident, his condition did not worsen as a result. He was able to continue working for several weeks prior to undergoing knee surgery. This surgery had been recommended to the worker prior to the accident.

The Panel concluded that the accident was not a significant cause of the disability which led to the surgery. The appeal was dismissed. [8 pages]

DECISION NO. 226/89A (11/09/90) Onen Heard Ronson

Damages, contribution or indemnity - Section 15 application - Reconsideration.

In Decision No. 226/89, the Panel found that the plaintiff's right of action was taken away against the owner/operator of a truck but that the right of action was not taken away against a trucking company. In this addendum, the Panel exercised its reconsideration powers to reopen the case to consider the application of s.8(11). The issue was whether the trucking company was entitled to a declaration under s.8(11) when there had been no finding that it was a Schedule 1 employer.

The application of s.8(11) depended upon a finding under s.8(9) that one or more of defendants in an action were immune from suit. The remaining defendants may then be entitled to relief under s.8(11). The

remaining defendants may be strangers to the Act. The purpose of s.8(11) is to ensure that defendants remaining in an action are not responsible for the liability of those removed from the action by the Act. Therefore, it is reasonable that s.8(11) would apply to strangers to the Act.

The Panel concluded that no damages, contribution or indemnity were recoverable from the trucking company for damages caused by the other defendant. [5 pages]

WCAT Decisions Considered: 961/88, 551/89

Cases Considered: Meyer v. Ontario (Workers' Compensation Board), 15 O.A.C. 202

DECISION NO. 621/90 (11/09/90) Onen Lebert Seguin

Delay (onset of symptoms).

The worker suffered right knee, low back and hand injuries when he fell from a work bench in June 1984. He appealed a decision of the Hearings Officer denying entitlement for a right shoulder condition.

There was a delay in recorded complaint of shoulder problems until August 1985. However, the worker was a credible witness and the Panel accepted that medical attention focused on the other injuries suffered in the accident but that he had shoulder pain that became worse over time. In addition, there was corroborative evidence from co-workers of shoulder problems after the accident. Further, there was medical opinion that the worker's condition could have been triggered by the accident. The appeal was allowed. [7 pages]

DECISION NO. 630/90I (11/09/90) Onen Lebert Seguin

Three week rule (witnesses).

The employer was appealing a decision of the Hearings Officer granting entitlement. The employer wanted to call two witnesses. However, the employer had not given three weeks notice and had not provided a sufficient summary of the anticipated evidence.

The appeal involved a question of credibility. The Panel was satisfied that the evidence of these witnesses would be important to the employer's case. Given the element of surprise at the hearing, it was not fair to the worker to proceed with the hearing. The hearing was adjourned. [5 pages]

DECISION NO. 516/89 (11/09/90) Stewart Fox Seguin

Suitable employment.

The worker fractured his arm in a compensable accident in April 1986. The worker appealed a decision of the Hearings Officer denying entitlement subsequent to March 1987. In April 1987, the employer offered the worker two modified jobs without wage loss. The worker rejected one of them. He performed the other job for about one week until a company-wide two week lay-off. He did not return to work after the lay-off.

On the evidence, the jobs were both suitable to the worker's capabilities. The worker was entitled to benefits for the period of the two week lay-off only. [9 pages]

DECISION NO. 444/89 (12/09/90) Signoroni Beattie Preston*Issue setting - Withdrawal (of appeal).*

The worker was appealing a decision of the Appeal Board denying benefits for a back disability in 1979, which the worker related to a compensable back injury suffered in 1975. Subsequently, the worker suffered further disabling episodes of back pain in 1983 and 1985. The 1983 claim was rejected by the Appeals Adjudicator but there had been no final decision of the Board regarding the 1985 claim.

It was preferable to consider entitlement for all the episodes together. The worker was allowed to withdraw his appeal in order to pursue entitlement for the 1985 claim at the Board. [5 pages]

WCAT Decisions Considered: 444/89L

DECISION NO. 788/89R (12/09/90) Onen Acheson Preston*Reconsideration.*

The worker's request to reconsider Decision No. 788/89 was denied. A new medical report submitted by the worker did not add in any significant way to the evidence which was before the Panel at the time of the original decision. [3 pages]

WCAT Decisions Considered: Decision No. 95R (1989), 11 W.C.A.T.R. 1; Decision Nos. 72R, 72R2, 788/89

**DECISION NO. 493/90 (12/09/90) Signoroni Fox Shuel
Galluzzo v. de Groot***Section 15 application - Worker (test) (organization test) - Independent operator - Casual employment.*

The defendants in a civil case applied to determine whether the plaintiff's right of action was taken away. The plaintiff's brother owned a food company. As the business grew, family members helped out. The plaintiff did promotional telemarketing for the business in the morning, then spent the afternoon preparing orders and making deliveries. She was injured in a motor vehicle accident while making a delivery.

The plaintiff submitted that she was an independent operator of a telemarketing business. However, on the evidence the Panel found that the plaintiff was not an independent operator. The only time she could have been an independent operator was the three months that she was doing this work for her brother but she provided a number of services that went beyond promotional work. The Panel could not split the nature of the services, considering questionable supporting evidence.

The Panel also found that the plaintiff was not a casual worker within the exception to the definition of worker. The activities done by the plaintiff were done on a daily basis for three months and were clearly done for the purpose of the brother's business. The continuous nature of the diversified activities brought her involvement beyond that of casual help. She was sufficiently integrated into the business to acquire the status of a worker.

The plaintiff's right of action was taken away. [12 pages]

WCAT Decisions Considered: 56/87

DECISION NO. 618/90 (12/09/90) Bradbury Robillard Jago

Access to worker file, s. 77.

Access to the worker's file was granted to the employer. [3 pages]

DECISION NO. 617/90L (12/09/90) Bradbury Robillard Jago

Leave to appeal (good reason to doubt correctness) (evidence to support Appeal Board conclusion).

There was evidence to support the Appeal Board conclusion denying entitlement subsequent to September 1982. Leave to appeal was denied. [3 pages]

**DECISION NO. 648/90 (12/09/90) Kenny Robillard Apsey
Reid v. Lowe**

Section 15 application - In the course of employment (proceeding to and from work).

The defendant in a civil action applied to determine whether the plaintiff's right of action was taken away. The plaintiff and defendant were both workers of the same Schedule 1 employer. They were involved in a motor vehicle accident as the plaintiff was driving his car to work and the defendant was leaving work. The accident occurred on a public road leading to the employer's mine. The employer provided bus transportation to the mine but both workers were late that day and, therefore, drove themselves.

In Decision No. 215, it was found that the employer's bus transportation was an integral part of the employer's mine operation and that workers being transported in the bus were in the course of employment. However, in this case, the workers were not using the bus provided by the employer. The accident occurred on a public road where they were subject to the same risks as the public.

There was no reason to make an exception to the usual rule that workers proceeding to and from work are not in the course of employment. The plaintiff's right of action was not taken away. [7 pages]

WCAT Decisions Considered: Decision No. 215 (1987), 4 W.C.A.T.R. 105; Decision Nos. 414, 228/87, 217/88, 649/88
Board Directives and Guidelines: Claims Adjudication Branch Procedures Manual, Document no. 33-14-01

DECISION NO. 628/89LR (13/09/90) Chapnik Robillard Jago

Reconsideration.

The worker's requested to reconsider Decision No. 628/89L was denied. The Panel's decision not to grant leave to appeal was reasonable in the circumstances. [4 pages]

WCAT Decisions Considered: 72R, 628/89L

DECISION NO. 667/89LR (13/09/90) Moore Cook Preston*Reconsideration.*

The worker's request to reconsider Decision No. 667/89L was denied. A new medical report submitted by the worker did not negate the central finding of the Appeal Board denying entitlement on the basis of delay in reporting and seeking treatment. [5 pages]

WCAT Decisions Considered: Decision No. 95R (1989), 11 W.C.A.T.R. 1; Decision Nos. 72R, 72R2, 667/89L

DECISION NO. 171/90R (13/09/90) Bigras Rao Meslin*Reconsideration.*

The employer's request to reconsider Decision No. 171/90 was denied. There was no reason to doubt the correctness of the decision. However, the Panel amended wording in the decision to clarify that the worker had a shoulder and neck disability resulting from repetitive strain at work. [4 pages]

WCAT Decisions Considered: Decision No. 95R (1989), 11 W.C.A.T.R. 1; Decision Nos. 72R, 72R2, 850/87R, 171/90

DECISION NO. 654/90I (13/09/90) Kenny Robillard Apsey*Adjournment (additional medical evidence).*

The worker was appealing denial of a commutation of his pension. The worker requested an adjournment of a hearing scheduled to be heard two days later. He submitted that he had developed a back injury and additional time was required to assess it and determine whether it was permanent or whether it would continue to worsen.

The worker had previously requested and obtained an adjournment for similar reasons. The Panel noted the waste of Tribunal resources involved. However, the evidence the worker wanted to obtain was the type of evidence that the panel would likely want to consider. Further, the worker and his lawyer were going to travel from Winnipeg for the hearing so there would be considerable cost and inconvenience if the hearing was adjourned on the scheduled day. In addition, there was no inconvenience to the employer, who was not participating.

The hearing was adjourned. The Panel directed that the file be closed without prejudice if the worker does not apply to reschedule the hearing within three months. [4 pages]

DECISION NO. 1005/88 (13/09/90) Bigras Drennan Preston*Withdrawal (of appeal).*

The worker was appealing a decision of the Appeals Adjudicator denying entitlement for psychotraumatic disability which the worker related to stress from his work as a firefighter. At a hearing pertaining to preliminary medical matters, the Panel decided that it required further medical information. The worker was reluctant to undergo further examination or consent to allow the Tribunal to obtain further information.

The worker asked to withdraw his appeal. The Panel noted that the issue of work-related stress was

evolving considerably and that complete medical information was of the utmost importance. The request was granted. The appeal was withdrawn. [5 pages]

WCAT Decisions Considered: Decision No. 696/88I (1988), 9 W.C.A.T.R. 367

DECISION NO. 776/89 (13/09/90) McIntosh-Janis Klym Barbeau

Delay (treatment).

The worker suffered a groin injury in 1970. The worker's estate appealed a decision of the Appeal Board denying entitlement for a low back condition.

There was a lack of recorded complaint of back symptoms until 1974. The worker was able to do heavy work until that time. Supportive medical evidence was based on acceptance of a back injury in 1970.

The Panel concluded that the back condition did not result from the 1970 accident. The appeal was dismissed. [7 pages]

WCAT Decisions Considered: 776/89L

DECISION NO. 536/90 (13/09/90) McIntosh-Janis Felice Apsey

Suitable employment.

The worker fractured his wrist in September 1986. He appealed a decision of the Hearings Officer denying benefits subsequent to July 1987. The Hearings Officer found that the worker refused suitable work.

The worker was temporarily partially disabled after July 1987 with medical restrictions against heavy gripping and lifting. The employer offered a modified job involving the assembly of nuts and bolts. The Panel found that the job was not suitable in July 1987 since it involved substantial gripping and twisting actions. The worker was entitled to full benefits until the end of August 1987. By that time, medical reports indicated that he was capable of increased wrist activity. The worker was not entitled to temporary benefits subsequent to September 1987. The Panel recommended that the worker be assessed for a pension.

The appeal was allowed in part. [8 pages]

DECISION NO. 472/89 (13/09/90) McIntosh-Janis Lebert Ronson

Disablement (repetitive work) - Trigger finger - Tenosynovitis (frictional).

The worker appealed a decision of the Hearings Officer denying entitlement for a bilateral thumb condition. The worker was a machine operator. His job required him to grip 300-400 bags per day, make up about 70 cardboard boxes per day and to perform various other activities with his hands. The original diagnosis was bilateral trigger thumb. However, some specialists found that the worker was not suffering from this condition.

It appeared that the initial diagnosis of trigger thumb led Board doctors to focus on whether the worker actually suffered from this condition rather than on whether the disability, regardless of diagnosis, was related to employment. The Panel requested further medical opinion, which explained terminology, including

trigger finger and frictional tenosynovitis, and offered the opinion that the worker's thumb condition was work related. The Panel found that the worker was suffering from a bilateral thumb condition, related to repetitive work. The appeal was allowed. [9 pages]

DECISION NO. 533/90 (10/09/90) Chapnik Lebert Preston

Subsequent incidents (outside work).

The worker suffered a medial collateral ligament strain of the right knee in September 1984, for which he received benefits until April 1985, when he returned to work. In November 1987 he suffered a second accident, at home, which caused an injury to the same area of his knee.

Though the worker received no treatment between April 1985 and November 1987, after the 1987 accident, he consistently stated that he had experienced pain in his right knee since the 1984 accident. He also reported that his knee had given out on several occasions which caused him to fall. Medical reports following the second accident related its date to September 1984 and described the injury as "recurrent".

The 1984 accident was a significant contributing factor to the 1987 accident. The worker was entitled to benefits. [5 pages]

Board Directives and Guidelines: Claims Adjudication Branch Procedures Manual, Document No. 33-27-02

DECISION NO. 529/90I (10/09/90) Moore Cook Meslin

Adjournment (representative availability).

In a letter dated April 23, 1990, the worker's representative requested that a May 1, 1990 hearing date be adjourned because of a scheduling conflict on his part. He asked that the hearing be scheduled in the month of September 1990. The Tribunal arranged for a July 11, 1990 hearing date upon approval by the representative's secretary. A notice confirming that date was sent on May 28, 1990. On July 3, 1990 the worker's representative wrote to request an adjournment, citing the unavailability of a medical witness. He again requested a September 1990 date. The worker appeared, unrepresented, on July 11 to request an adjournment.

The hearing was recessed to a date to be set by the Tribunal's Scheduling Department. The Panel, which remained seized of this appeal, stated that the manner in which the adjournment was obtained prompted concerns that the representative's conduct reflected disregard for the Tribunal's process. He was asked to address those concerns upon the hearing being reconvened. [5 pages]

DECISION NO. 598/90L (10/09/90) Bigras Higson Meslin

Leave to appeal (good reason to doubt correctness) (consideration of evidence).

The worker was granted leave to appeal a decision of the WCB Appeal Board which denied him benefits for a back condition diagnosed as spondylolisthesis.

The opinion of three independent specialists was that although the worker's spondylolisthesis was congenital, it was possible that the symptoms were triggered by an accident. The Appeal Board did not mention the independent doctors' opinions and instead relied on a one-line opinion of a WCB doctor.

The Appeal Board failed to mention why the view of the three doctors on the possible work-relatedness of the injury was not considered in its findings. Omitting to mention why critical facts pertaining to the medical issue in the case, which appeared on the face of the record to be preponderant in weight, were rejected, constituted good reason to doubt the correctness of the Appeal Board decision. [5 pages]

WCAT Decisions Considered: Decision No. 131 (1986), 2 W.C.A.T.R. 77; Decision No. 466L (1987), 5 W.C.A.T.R.57; Decision No. 915 (1987), 7 W.C.A.T.R. 1

DECISION NO. 363/90 (14/09/90) Hartman Robillard Howes

Accident (occurrence).

The worker appealed a decision of the Hearings Officer denying entitlement for a low back strain which the worker claimed resulted from an unwitnessed accident.

The worker gave answers in a straightforward manner but at times was confused as to dates and times. His description of the onset of pain and his activities following it were consistent. There was evidence from a co-worker that the worker was favouring his back on the day of the accident.

The appeal was allowed. [5 pages]

DECISION NO. 596/90 (17/09/90) McGrath McCombie Barbeau

Access to worker file, s. 77.

Access to the worker's file was granted to the employer. [3 pages]

DECISION NO. 595/90 (17/09/90) McGrath McCombie Barbeau

Access to worker file, s. 77.

Access to the worker's file was granted to the employer. [3 pages]

DECISION NO. 594/90 (17/09/90) McGrath McCombie Barbeau

Access to worker file, s. 77 (deletion of material).

Access to the worker's file was granted to the employer, except for most of a report prepared by a psychologist at HRC. The issue in dispute was SIEF. The report was very personal in nature and was irrelevant to the issue in dispute. The Panel deleted all of the report except for two paragraphs which stated that there was very little indication of functional overlay. [4 pages]

DECISION NO. 597/90 (17/09/90) McGrath McCombie Barbeau

Access to worker file, s. 77.

Access to the worker's file was granted to the employer. [3 pages]

DECISION NO. 547/90 (17/09/90) Robeson Robillard Meslin

Access to worker file, s. 77.

Access to the worker's file was granted to the employer, except for portions of one letter which were not relevant. [3 pages]

DECISION NO. 588/90 (18/09/90) Robeson Lebert Barbeau

Access to worker file, s. 77.

Access to the worker's file was granted to the employer. [3 pages]

DECISION NO. 624/90 (18/09/90) Robeson Cook Meslin

Access to worker file, s. 77.

Access to the worker's file was granted to the employer. [3 pages]

DECISION NO. 627/90 (18/09/90) Robeson Cook Meslin

Access to worker file, s. 77.

Access to the worker's file was granted to the employer, except for one paragraph of one report which was not relevant. [4 pages]

DECISION NO. 405/90 (17/09/90) Kenny Higson Meslin

In the course of employment (horseplay) - In the course of employment (work relatedness test) - Arising out of employment (horseplay).

The worker appealed a decision of the Hearings Officer denying entitlement for a leg injury. The worker was engaged in some verbal horseplay with another worker when the other worker make a lunging gesture. The worker turned to run on a reflex response, fell and injured his leg. The entire incident, including the comment and the gesture, was taken as a joke by both workers. The Board found that the accident did not arise out of employment.

Decision No. 24F found that the question of whether an accident occurred in the course of employment related only to where workers were at the time of their injuries and whether they were there because of

employment. The Panel disagreed and found that facts about the activity itself and the working environment also had to be considered in determining employment relatedness. In considering whether the worker's injury was sufficiently employment related that it occurred in the course of employment, the Panel considered the time, the place and the activity in which the worker was engaged.

The injury occurred on the employer's premises during working hours. This type of banter was quite common in the workplace. The Panel found that the injury occurred in the course of employment.

The question of whether an injury arises out of employment is essentially a causation question. If the horseplay activity qualifies as part of the employment and the injury arises out of the activity, then the injury arises out of employment. That was the situation in this case.

The injury arose out of and in the course of employment. The appeal was allowed. [9 pages]

WCAT Decisions Considered: Decision No. 24F (1990), 13 W.C.A.T.R. 1; Decision No. 337 (1986), 2 W.C.A.T.R.141; Decision No. 234/87 (1989), 10 W.C.A.T.R. 64; Decision No. 714/87 (1987), 6 W.C.A.T.R. 235; Decision Nos. 580/87, 804/89
Board Directives and Guidelines: Operational Policy Manual, Document no. 03-01-02

DECISION NO. 792/89 (17/09/90) Chapnik Higson Jago

Health care (glasses) - Board Directives and Guidelines (health care) (glasses).

The worker suffered a compensable accident which required removal of his left eye. The worker appealed a decision of the Hearings Officer denying entitlement for the purchase of glasses with photogrey lenses.

Medical evidence supported the worker's position that the photogrey lenses reduced strain on the his right eye. There was no reasonable explanation for Board policy which limited benefits to one pair of glasses and which put time limits on the development of eye problems in the uninjured eye.

The appeal was allowed. The worker was entitled to reimbursement for the glasses he had purchased and was entitled to new glasses in the future as required. [8 pages]

Other Statutes Considered: Interpretation Act, R.S.O. 1980 c.219, s.10
Board Directives and Guidelines: Claims Adjudication Branch Procedures Manual, Document nos. 33-01-06, 33-17-04;
Health Care Benefits Policy Manual, Document no. 02-02-04
Cases Considered: WCB v. Theed, [1940] 3 D.L.R. 561

DECISION NO. 626/90 (18/09/90) Robeson Cook Meslin

Access to worker file, s. 77.

Access to the worker's file was granted to the employer, except for one document which was not relevant. [3 pages]

DECISION NO. 625/90 (18/09/90) Robeson Cook Meslin

Access to worker file, s. 77.

Access to the worker's file was granted to the employer. [3 pages]

DECISION NO. 678/90I (19/09/90) Kenny Ferrari Preston*Summons - Procedure (absent witnesses).*

The worker was appealing a decision denying entitlement. The Tribunal summonsed two witnesses at the request of the employer. However, neither of them attended.

The Panel adjourned the hearing and directed that a new summons be served together with this decision. If they do not appear again, the Panel would hear submissions as to whether they should be arrested by the Sheriff or fined for failing to attend. [4 pages]

DECISION NO. 109/89 (19/09/90) Carlan Acheson Ronson*Procedure (interim decision).*

Decision No. 109/89I was made into a final decision since the Panel was unable to continue to consider the outstanding, discrete issue. This decision was made without prejudice to the worker's claim on the outstanding issue. [2 pages]

DECISION NO. 434/89 (19/09/90) Carlan Fox Preston*Procedure (interim decision).*

Decision No. 434/89I was made into a final decision since the Panel was unable to continue to consider the outstanding, discrete issue. This decision was made without prejudice to the worker's claim on the outstanding issue. [2 pages]

DECISION NO. 245/88R (20/09/90) McGrath Fox Preston*Reconsideration.*

The worker's request to reconsider Decision No. 245/88 was denied. [3 pages]

WCAT Decisions Considered: Decision No. 95R (1989), 11 W.C.A.T.R. 1; Decision Nos. 72R, 72R2, 245/88

DECISION NO. 238/89 (20/09/90) Kenny Drennan Apsey

Second Injury and Enhancement Fund (preexisting condition) - Board Directives and Guidelines (SIEF) (severity of accident) - Pensions (assessment) (back) - Disc, herniated - Arachnoiditis.

The worker had back problems at work in March 1972, May 1972 and October 1972. He laid off work early in November 1972 and returned to work at the end of that month. In January 1974 the worker again laid off work. Disc herniation was diagnosed and he was never again able to return to his regular work as a welder. He had back surgery in February 1974 and again in 1981, when untreatable arachnoiditis was diagnosed. The worker was awarded a 20% pension in 1977, increased to 40% in 1983. The employer appealed the granting

of continuing benefits beyond a 6 to 12 week period. Alternatively, the employer sought a reduction in the worker's pension rating or SIEF relief.

The worker, who in 1972 was aged 21, had some pre-existing, largely asymptomatic, degenerative disc disease. Nonetheless, the May 1972 accident was a significant contributing factor to the worker's subsequent back disability. He continued to experience pain after that date. The fast bending, twisting and lifting nature of the worker's welding job exposed his back to ongoing stress. There was no new accident in January 1974. The worker's condition at that time was the culmination of the May 1972 injury and the work that he subsequently performed. The condition of arachnoiditis likely resulted from the compensable condition, in particular from the myelograms and surgery performed to treat that condition.

Given the considerable restriction of movement, reduced sitting and walking tolerance, and the leg disability which led to a one-half inch wasting of the right thigh, the 40% rating was correct.

Though degenerative changes may have made the worker somewhat more vulnerable than others aged 21, his condition was not a "pre-existing condition" within the meaning of the Board's SIEF policy. SIEF was not designed to apply whenever minor degenerative changes made a worker's back somewhat vulnerable to workplace injuries. It was designed to provide cost relief in situations where employers may not otherwise hire a worker who had been disabled in the past or in situations where a pre-existing condition creates greater than normal costs. This was not such a situation. The employer's appeal was dismissed. [16 pages]

WCAT Decisions Considered: Decision No. 915 (1987), 7 W.C.A.T.R. 1

Board Directives and Guidelines: Claims Adjudication Branch Procedures Manual, Document Nos. 33-02-20, 33-28-01

DECISION NO. 593/89 (21/09/90) Strachan Robillard Jago

Psychotraumatic disability - Chronic pain - Board Directives and Guidelines (psychotraumatic disability) (five year guideline).

The worker suffered a back injury in 1974, for which she was awarded a 20% pension for organic disability, later increased to 30%. The worker appealed a decision of the Hearings Officer denying entitlement for psychotraumatic disability.

Depression was first diagnosed in 1984. The Panel found that the Board policy regarding entitlement for psychotraumatic disability within five years of the injury was in accordance with the Act. The five year period was a guideline only. Entitlement was possible after five years if a causal relationship was established.

On the evidence, the depressive symptoms were secondary to the organic condition and chronic pain. The Panel noted that the issue of chronic pain had not yet been pursued at the Board. The depression could be related to other non-compensable factors, such as Meniere's disease. The appeal was dismissed. [8 pages]

WCAT Decisions Considered: Decision No. 915 (1987), 7 W.C.A.T.R. 1

Board Directives and Guidelines: Claims Adjudication Branch Procedures Manual, Document no. 33-21-01

DECISION NO. 669/90 (21/09/90) Strachan Cook Jago

Accident (occurrence).

The worker appealed a decision of the Hearings Officer denying entitlement for a wrist injury, which the worker claimed was related to an accident at work.

The Panel found that the injury did not occur at work but, rather, occurred during an altercation with

his landlord the following day, considering delay in reporting the injury and delay in seeking medical treatment until after the altercation with the landlord. The appeal was dismissed. [6 pages]

DECISION NO. 470/90 (21/09/90) Hartman Lebert Barbeau

Maximal medical rehabilitation - Psychotraumatic disability.

The worker suffered a compensable injury in 1982. He received total temporary benefits until May 1985, then 50% benefits until September 1985 and a pension thereafter. The worker's widow appealed a decision of the Hearings Officer denying continuing temporary total benefits and denying an increase in the pension.

Considering the medical reports, the worker's condition was permanent by the time he was assessed for the pension in September 1985. In addition, the worker was not suffering from a psychotraumatic disability related to the compensable accident. The appeal was dismissed. [8 pages]

WCAT Decisions Considered: Decision No. 915 (1987), 7 W.C.A.T.R. 1; Decision Nos. 790/87, 289/88, 800/88, 899/88, 358/89, 435/89

DECISION NO. 106/89 (21/09/90) Kenny Jackson Meslin

Chronic pain - Psychotraumatic disability - Conversion neurosis - Medical opinion (chronic pain) - Psychogenic pain.

The worker suffered compensable accidents in 1975, 1980 and 1982, for which she was awarded a pension for organic disability. She appealed a decision of the Appeals Adjudicator denying temporary benefits subsequent to September 1983 and a decision of the Hearings Officer denying entitlement for psychotraumatic disability.

Psychotraumatic disabilities are treated differently than chronic pain. The Panel obtained the assistance of a s.86h assessor to distinguish between conversion disorder, which would be a psychotraumatic disability, and psychogenic pain disorder, which would be a chronic pain disability. Conversion disorder involves: a loss or alteration of physical functioning that suggests a physical disorder; symptoms which are not consciously produced; symptoms which cannot be explained by any physical disorder; symptoms which are an expression of psychological needs or conflict. Psychogenic pain disorder is very similar except that the presenting symptom is pain, rather than a physical disability, and the complaint of pain is grossly in excess of what would be expected. There may be elements of both psychogenic pain disorder and conversion reaction on examination.

In this case, there were numerous medical reports. These had to be considered carefully since terminology was sometimes used descriptively rather than diagnostically and since terminology had changed over the years. Considering these reports, the Panel concluded that the predominant feature of the worker's problem was pain and that her condition was best diagnosed as psychogenic pain disorder. Although some of the pain complaint was a conscious exaggeration of symptoms, the Panel was satisfied that the pain was much greater than would be expected.

Since the best diagnosis for the psychological component of the worker's condition was psychogenic pain disorder, the worker was not entitled to benefits for psychotraumatic disability. The appeal was dismissed. However, the worker could apply to have her pension reassessed in accordance with the Board's chronic pain disorder policy. [30 pages]

WCAT Decisions Considered: Decision No. 915 (1987), 7 W.C.A.T.R. 1; Decision No. 638/89 (1989), 12 W.C.A.T.R. 221
Cases Considered: Review of Decision Nos. 915 and 915A (WCB Bd. of Dir.)

DECISION NO. 580/90 (24/09/90) Hartman Rao Nipshagen

Disablement (nature of work).

The worker appealed a decision of the Hearings Officer denying entitlement for a low back condition. The worker began to experience back pain in September 1987 and laid off in January 1988. It was not until April that he related the back pain to work. The worker had preexisting degenerative disc disease. There was no indication that the exacerbation of the worker's condition occurred at work. His work did require bending but there was no indication that this contributed significantly to his condition.

The appeal was dismissed. [8 pages]

DECISION NO. 508/90 (24/09/90) Hartman Cook Clarke

Continuity (of treatment) - Benefit of the doubt.

The worker suffered compensable back strains in 1973, 1983 and 1985. In July 1987, while getting out of his car, the worker coughed and suffered a further sprain. The worker appealed a decision of the Hearings Officer denying entitlement for the incident in 1987.

There was evidence that coughing increases pressure on a disc and that if it is already damaged, the raised pressure may cause bulging. It was likely that the worker was symptom free much of the time from 1973 to 1987 with occasional flare-ups. The evidence as to whether or not the compensable accidents contributed significantly to the worker's condition in July 1987 was approximately equal in weight. The Panel applied the benefit of doubt in favour of the worker. The appeal was allowed. [9 pages]

DECISION NO. 689/90 (25/09/90) Sandomirsky Fuhrman Preston

Access to worker file, s. 77.

Access to the worker's file was granted to the employer, except for one irrelevant reference to a non-compensable condition. [4 pages]

DECISION NO. 782/88 (25/09/90) Strachan Fox Preston

Arising out of employment (fighting) - In the course of employment (fighting).

The worker appealed a decision of the Hearings Officer denying entitlement for an injury resulting from an altercation at work. While returning from coffee break, the worker and a co-worker got into the altercation regarding pictures in the workers' lockers.

For an accident to arise out of employment, there must be a significant element of work relatedness. This significant element of work relatedness exists if the act occasioning the injury is reasonably incidental to employment. In this case, the worker did not offer any immediate provocation. The worker appeared to be more the victim of an aggressive act than a willing participant in an altercation. There was longstanding personal animosity between the worker and the co-worker but this animosity appeared to relate primarily to the worker's job. The appeal was allowed. [6 pages]

WCAT Decisions Considered: Decision No. 470/88 (1988), 9 W.C.A.T.R. 315

Board Directives and Guidelines: Claims Adjudication Branch Procedures Manual, Document no. 33-05-03

DECISION NO. 679/90 (25/09/90) Signoroni Fox Ronson

Continuing entitlement - Aggravation (preexisting condition).

The worker suffered a low back injury In August 1985 when he attempted to prevent heavy equipment from slipping. The Board granted benefits on an aggravation basis until March 1987. The worker appealed the decision of the Hearings Officer denying continuing benefits.

On the evidence, the worker's condition did not return to its pre-accident state. The accident significantly altered the course of his condition, as documented by numerous aggravations since the accident. The appeal was allowed. [8 pages]

DECISION NO. 266/89 (26/09/90) Strachan Heard Jago

Exposure (pesticide) - Leukemia.

The worker was a truck driver who was exposed to pesticide in January 1980 when a drum broke open. In February 1980, he was admitted to hospital with symptoms such as nausea, dizziness and extreme fatigue. He died from leukemia in July 1980. The worker's widow appealed a decision of the Hearings Officer denying dependency benefits.

There was no entitlement to benefits for industrial disease since leukemia was not peculiar to or characteristic of the worker's occupation. There was also no entitlement for an accident. The latency

period was too short to support a causal relationship between the incident in January and the development of leukemia.

The appeal was dismissed. [9 pages]

WCAT Decisions Considered: Decision No. 850 (1988), 8 W.C.A.T.R. 73

DECISION NO. 631/90 (26/09/90) Signoroni Beattie Preston

Pensions (lump sum) (ten per cent pension) (advantage to worker).

The worker suffered a low back injury in 1984 for which he was awarded a 10% pension. The worker appealed a decision of the Hearings Officer denying lump sum payment of the pension under s.45(4) of the Act. The worker wanted the money to pay off debts and to purchase further equipment for a tow truck business.

A review of the worker's work history showed that the worker had numerous jobs. There was no reliable pattern of employment. There were two previous unsuccessful attempts to become self-employed. The tow truck business had not been in existence for long but was financially solvent. The Panel was not satisfied that the work as a tow truck driver was suitable, considering the physically demanding nature of the job.

The Panel found that the payment of the lump sum would not be to the advantage of the worker. The appeal was dismissed. [8 pages]

DECISION NO. 68/90 (26/09/90) Carlan Beattie Preston

Pensions (assessment) (standard of review) - Pensions (assessment) (knee).

The worker suffered a left knee injury in 1981, for which he was awarded an 8% pension. After a reassessment requested by the Panel, the pension was increased to 12%. The worker appealed the pension level for the left knee and denial of a pension for the right knee.

The Panel agreed with Decision No. 915 that the Tribunal has the express statutory authority to make the same decisions as the Board's medical examiners. In the absence of evidence on which a panel can rely, a panel could exercise the power directly to assess the pension level, relying on evidence that it thought reasonable. The Panel did not agree with a different approach that would limit review to demonstrable error by the Board in assessing the level of disability.

The Panel wrote to the Board asking for an explanation of the findings required for the different pension ratings for knee disabilities but the Board provided only a general explanation of the process. The Panel decided that it would assess the pension by looking at how the injury impacted on the daily living activities of the worker and establish a pension which would reflect a level of disability commensurate with the injury, bearing in mind the Rating Schedule, the assessment of Board examiners and treating physicians.

The Rating Schedule provides for awards of between 5% and 25% for knee disabilities. The Board examiners and treating physicians were consistent in their findings of weakness and atrophy. The worker was able to continue working and participate in some limited recreational activities. The Panel referred to other decisions of the Tribunal where similar injuries were assessed and found that a 12% award was in keeping with the Board's standards for knee disabilities. Further, the original 8% award was probably also in keeping with the general standard for knee disabilities.

The Panel then compared this standard for knee disabilities with identifiable patterns for other conditions and found that the same limitations on daily living activities were similar to a low back rating of 15%. The Panel concluded that the original 8% pension was not consistent with the entire rating system. The worker should have been rated originally at 12% with deterioration over the years resulting in an increase to 16%.

The worker was not entitled to a pension for occasional right knee disability. There was no evidence that the worker was disabled from work by right knee problems or that there was a permanent impairment of the worker's capacity to earn.

The appeal was allowed in part. [13 pages]

Decision No. 915 (1987), 7 W.C.A.T.R. 1; Decision Nos. 995/89, 80/90, 578/90

DECISION NO. 684/89 (20/09/90) Carlan Beattie Preston

Stress (standard of proof) - Causation (medical evidence) (standard of proof) (stress) - Evidence (privacy of worker) - Procedure (post-hearing evidence) - Adjournment (preparation) - Correctional officer (young offenders).

The worker appealed the denial of benefits for an August 1985 lay-off from work which she contended was the result of job-related stress. The worker had been employed since 1974 in a position that involved the rehabilitation, control, care and supervision of young offenders in a secure custody and detention setting. The worker contended that the proclamation of the Young Offenders Act (Can.) in April 1985 significantly changed her work environment and contributed to her stress.

In preliminary matters, the Panel refused to grant the employer an adjournment or the right to provide additional information post-hearing. Until one week before the hearing, the employer had taken the position

that it did not intend to participate in the process. That decision had already prolonged the hearing process by nine months. The employer had adequate time and resources to properly prepare for the hearing prior to the hearing date.

For two months prior to the lay-off, the worker had been suffering headaches and general tenseness at work. On the day of her lay-off she suffered a sudden onset of palpitations, shortness of breath, vertigo and syncope. She was taken to hospital where anxiety disorder was diagnosed.

The proclamation of the Young Offenders Act led to older, more criminalized and more aggressive residents being introduced to the work place. The additional hostility and turbulence in the system, during the transition period after April 1985, constituted unusual stressors.

The medical evidence clearly established a disability attributable to anxiety or stress. The medical evidence, together with the findings as to tensions in the workplace led the Panel to conclude that there was a relationship between the work and the disability.

The two doctors who treated the worker were not psychiatrists. However, one had evaluated the worker during a previous stressful time (the dissolution of her long-term marriage) and the other focused his practice on therapy and counselling. Neither treatment by a certified psychiatrist nor the identification of a recognized psychiatric disability was a prerequisite to entitlement in cases of stress-related disability.

The review of any circumstances in the worker's private life that might have had the potential of producing non-work-related stressors did not constitute an unfair invasion of the worker's privacy. In this case, the worker's minor financial problems, her entry into menopause and her decision to enter into another relationship, did not contribute to the disability. As the work-related stressors were the predominant contributing factor to the disability, it was not necessary to decide whether this higher test had to be met in stress claims or whether the usual, less onerous, test of a significant contributing factor was applicable.

The appeal was allowed. The worker was entitled to total benefits at least until March 1986, when it was determined that she could return to modified duties. [18 pages]

DECISION NO. 616/90 (27/09/90) Strachan Nipshagen Robillard

Credibility (lay-off)

The worker was not entitled to benefits as the result of a burn sustained while performing his job as a welder. The burn occurred on November 30, 1987. The worker continued his regular duties without reporting the incident. On December 4, 1987 he was laid off by the employer because of dissatisfaction with his work. On December 6, 1987 the worker sought medical attention for the first time. At that time the injury was described as a small second degree burn and no indication was given that it would disable the worker from performing his usual work. The evidence of co-workers and the medical reports indicated that the burn was small and was healing well.

On the evidence, the worker's failure to return to work until March 1988 was not due to the injury but rather was the result of a conscious decision not to seek alternate employment. The worker was not entitled to benefits. [8 pages]

DECISION NO. 693/90 (27/09/90) Faubert Meslin McCombie

Permanent disability - Maximal medical rehabilitation- Temporary partial dissability.

The worker sustained an injury to his middle finger in March 1987. He received temporary total disability benefits until October 1988. He was then paid full temporary partial disability benefits until

February 21, 1989. On February 2, 1989, the worker was granted a 2.5% pension.

The Panel agreed with the worker that the Hearings Officer was wrong in concluding that the worker's pre-accident job constituted suitable employment. No other suitable work was offered. However, this did not necessarily entitle the worker to further temporary disability benefits.

On the evidence, the worker had reached maximal medical rehabilitation by December 1988. He was therefore not entitled to temporary partial disability benefits after February 1989. The worker was suffering from a permanent partial disability at the time and his benefits must be determined with regard to the provisions of s. 45 of the pre-1989 Act. [5 pages]

DECISION NO. 497/90 (27/09/90) Strachan Robillard Apsey
Williamson v. Johnson

*Section 15 application - Worker (test) (business reality) - Class of employer
(operation of apartment building).*

The defendants in a civil case applied to determine whether the plaintiff's right of action was taken away. The defendant was driving a car owned by his father at the time of a motor vehicle accident. He had gone to pick up a ladder which was needed for his work. The defendant was painting some rental properties owned as a partnership by his parents. The issues concerned the defendant's employment status and the status of the partnership as a Schedule 1 employer.

The objective of the partnership was capital appreciation of the properties. However, it was necessary to operate the buildings and act as landlord. The Panel found that the partnership came within Schedule 1 class 25 for operation of an apartment building.

The Panel applied a business reality test to determine that the defendant was a worker. He painted two apartment buildings during the summer. He was paid a flat fee for the job but did not provide his own tools or supplies. There were none of the usual indicia of an independent business such as telephone listings or business cards. Regarding control, the significant consideration is whether there is a right to direct the work activity rather than any actual direction or instruction. Even such a matter as getting the ladder was discussed by the defendant with his parents. The reality of the business situation was that defendant's parents gave him the painting job. The defendant was a worker in the course of employment.

The plaintiffs' right of action was taken away. [12 pages]

Regulations Considered: Reg. 951 Schedule 1, class 25
Other Statutes Considered: Labour Relations Act, R.S.O. 1980 c.228

DECISION NO. 703/90 (28/09/90) McIntosh-Janis Fox Chapman

Access to worker file, s. 77.

The employer appealed a decision denying access to an Inter-Divisional Communication, which the Board considered sensitive. The Panel found that the document was not sensitive in the sense of being harmful information. However, the document was not relevant to the issues in dispute. The appeal was dismissed. [3 pages]

DECISION NO. 704/90L (27/09/90) McIntosh-Janis Fox Chapman

Leave to appeal (good reason to doubt correctness) (evidence to support Appeal Board conclusion) - Significantly greater than is usual.

The worker applied for leave to appeal a decision of the Appeal Board denying a temporary supplement.

The worker submitted that the later award of an increased pension retroactive to the period in question indicated that the worker's impairment of earning capacity was significantly greater than is usual. The Panel noted Decision No. 670/88 which found that a retroactive increase in pension might indicate that the worker received all the compensation to which she was entitled and that, therefore, it would be harder to establish an impairment of earning capacity that was significantly greater than is usual.

In addition, the worker made no submissions regarding the implicit finding of the Appeal Board that there was no rehabilitative purpose to granting a supplement during the period in question.

Leave to appeal was denied. [5 pages]

WCAT Decisions Considered: 670/88, 908/89

DECISION NO. 582/90 (28/09/90) Signoroni Cook Meslin

Withdrawal (of appeal).

The worker was allowed to withdraw his appeal to pursue several issues that had not been decided finally by the Board. [4 pages]

DECISION NO. 269/90 (27/09/90) Carlan Robillard Nipshagen

White finger disease - Disablement (vibrations) (tools) - Presumptions (section 122)

The worker appealed a decision of the Appeals Adjudicator denying entitlement for white finger disease. The worker was a timberman for a mining company. He had intermittent exposure to vibratory tools, such as a jack leg drill disease and hand held grinders.

White finger disease is listed in the Board policies as an industrial. However, it is not included in Schedule 3. Therefore, the presumption in s.122(9) does not apply.

The Panel found that the worker's condition was a disablement within ss. 3(1) and 1(1)(a)(iii). Although the worker did not meet the Board requirement of two years of continuous exposure, he did have significant exposure to vibrations. There was medical evidence supporting the claim. Other causes of the symptoms were ruled out.

The appeal was allowed. [9 pages]

Regulations Considered: Reg. 951 Schedule 3

Board Directives and Guidelines: Operational Policy Manual, Document no. 94-03-08

DECISION NO. 127/90 (01/10/90) Faubert Lebert Jago

Board Directives and Guidelines (penalty assessments) (distortions) (personal coverage) - Penalties (new owner).

The employer appealed the imposition of a penalty assessment, in 1986, that related to the years 1982 to 1984. The employer had a prior history of special assessments. A special assessment levied for the period 1985 to 1987 was cancelled on the basis that the cost of one claim distorted the employer's record.

A statistical analysis of the employer's accident frequency did not support the employer's contention that there had been an actual improvement in safety performance. The results of an IAPA safety audit, in December 1988, indicated that very little progress had been made in introducing appropriate safety measures. Any significant progress that may have been made after December 1988 was too remote in time from the period under assessment to warrant relief from assessment.

The change in ownership of the company was not sufficient reason to eliminate the assessment. One of the partners in the current company had been involved in that capacity since the period in question. A new partner was the employer's former accountant who must be taken to have been aware of the outstanding assessment and of the Board's practice in respect of such assessments.

The fact that two of the claimants during the assessment period were former owners of the employer, did not constitute a distorting factor sufficient to support an objection to the special assessment under Board policy. When owners of a company seek the benefit of personal coverage they must bear the consequences, including the resultant increased accident costs. [9 pages]

WCAT Decisions Considered: Decision No. 598/87 (1987), 6 W.C.A.T.R. 183; Decision No. 672/88 (1988), 9 W.C.A.T.R. 360; Decision No. 256/87

Regulations Considered: Reg. 951, s. 6(1)

Board Directives and Guidelines: Additional Assessments Policies and Procedures, Board Minute 6, January 14, 1975

DECISION NO. 632/90 (01/10/90) Starkman Beattie Preston

Dependants - Dependency benefits - Words and phrases (earnings, s.1(1)(i)).

The worker suffered a compensable fatal accident. His parents appealed a decision of the Hearings Officer denying dependency benefits.

The worker and his parents were native Canadians and lived on an Indian reserve. The worker was 49 years old at the time of his death, had no wife or children and lived in his parents' home. The worker built the house for his parents. He did chores around the house as well as supplying food in the form of fish and wildlife. He did not earn wages for most of his life although he was working for a short period at a building project on the reserve at the time of his death.

The worker did chores around the house and provided food. The parents also provided certain benefits to the worker, such as a place to live and perhaps money from their pension income. The Panel found that the relationship between the worker and his parents was one of inter-dependency. Section 1(1)(i) provides that earnings must be capable of being estimated in terms of money. The provisions of services and foodstuffs was capable of being estimated in those terms. The definition of dependant in s.1(1)(f) made it clear that it was sufficient to be partly dependent.

The Panel found that the worker's parents were partially dependent upon him. The parents were entitled to dependency benefits under s.36(6). The appeal was allowed. [5 pages]

DECISION NO. 634/90 (01/10/90) Starkman Beattie Preston*Health care (chiropractic) - Apportionment (health care).*

The worker suffered a low back injury in 1977 for which he was awarded a pension. The worker appealed a decision of the Hearings Officer denying entitlement to payment for ongoing chiropractic treatment.

The chiropractic treatment was of assistance in alleviating pain caused by the compensable low back condition and also in alleviating non-compensable headaches and non-compensable neck pain. In the circumstances, it was reasonable to pay for a portion of the cost of the chiropractic treatment. Since the precise portion of the treatment related to the lower back could not be determined, the Panel directed the Board to pay 50% of the cost of the treatment. [4 pages]

DECISION NO. 674/90 (02/10/90) McIntosh-Janis Jackson Ronson*Permanent disability - Second Injury and Enhancement Fund (preexisting condition).*

The worker suffered a compensable injury to her low back, neck and shoulder in January 1985. In August 1985, she was awarded a 15% pension for her low back and a 10% pension for her neck and shoulder. After a reassessment in 1988, the neck and shoulder pension was reduced to 5%. The worker appealed the lowering of the pension. The employer appealed the award of only 50% SIEF relief.

The usual referral time for determination of permanent disability of the worker's condition would have been 12 to 18 months. The worker was rated originally much earlier than that. The Panel concluded that the 1985 assessment was conducted before the shoulder had totally stabilized. The 1988 assessment more accurately reflected the stabilized permanent disability with which the worker was left. The worker's appeal was dismissed.

On the issue of SIEF, it was accepted that the accident was minor. The worker had preexisting degenerative disc disease. According to the Board policy on preexisting conditions, regarding pension assessment, the existence of a prior disability may be relevant. However, regarding SIEF, the significance of a preexisting condition is to be assessed in terms of the extent that it makes the worker more liable to develop disability of greater severity than a normal person. There need not be a preexisting disability. The only doctor who supported a finding of a major preexisting condition appeared to consider factors other than the severity of the preexisting condition, such as the severity of the injury and the nature of the worker's work.

The Panel accepted that the worker's preexisting degenerative disc disease was minor. Other preexisting conditions were not significant. Even considering the possible of these other conditions, the Panel was satisfied with the categorization of the preexisting conditions as minor. The employer's appeal was dismissed. [8 pages]

WCAT Decisions Considered: Decision No. 915 (1987), 7 W.C.A.T.R. 1; Decision No. 607/90
Board Directives and Guidelines: Claims Services Division Manual, s.108(2), p.235, Directive 1; Operational Policy Manual, Document no. 05-03-02

DECISION NO. 756/89LR (03/10/90) Chapnik Cook Nipshagen*Reconsideration.*

The worker applied to reconsider Decision No. 756/89L. The worker submitted new evidence to support entitlement for a knee disability in the form of a letter from a co-worker and a medical report.

Even if the evidence concerning the accidents at work were accepted, the worker's knee disability could still have been caused by an underlying condition. The medical report raised work-related trauma as a possibility only for the cause of the worker's condition.

The request to reconsider was denied. [5 pages]

WCAT Decisions Considered: 72R, 72R2, 756/89L

DECISION NO. 839/89R (03/10/90) Kenny Klym Jago

Reconsideration.

The worker's request to reconsider Decision No. 839/89 was denied. The Panel made one minor amendment to clarify the decision. [4 pages]

WCAT Decisions considered: 839/89I, 839/89

DECISION NO. 1016/89 (03/10/90) Moore Robillard Preston

Continuing entitlement - Spondylolysis.

The worker suffered a compensable injury in April 1969 when a forklift that he was pulling fell on him. He found himself in a squatting position, bent forward and down, bearing the weight of the 600 pound forklift. He received benefits for two weeks, worked for five weeks, then received benefits for another four weeks. No benefits were paid after July 1969. The worker received no medical treatment between September 1969 and November 1971, when he began to experience disabling problems with his legs and lower back.

The back disability which disabled the worker at various times from December 1971 onwards was the result of the April 1969 accident. The mechanics of the accident were such that a stress fracture could have resulted, which in turn would either lead to spondylolysis or make preexisting spondylolysis symptomatic. Though the worker's symptoms became worse in 1972, he did continue to experience symptoms consistent with spondylolysis between 1969 and 1972, particularly in his lower legs. The worker was entitled to benefits. [7 pages]

DECISION NO. 130/90 (3/10/90) Signoroni Rao Meslin

Disablement (nature of work) - Credibility.

The worker claimed that he suffered from a number of conditions affecting his neck, right shoulder, right arm, right hand, left elbow, left thigh, and both hips. He claimed that they resulted from the nature of the employment that he performed between November 1980 and February 1987. The worker performed several different jobs with the employer, which was a battery manufacturer. As the medical evidence supporting the disability and the causation issues were weak, the appeal rested, in large measure, on the worker's credibility.

Though the worker underwent hip surgery in May 1981, he had suffered from a left hip problem several months before he commenced the employment. The hip symptoms, reported by the worker after he started working, could not be medically distinguished from those suffered before commencement of the employment. Two of the jobs that the worker found most demanding were not performed for extensive periods and were not as demanding as alleged. The other jobs were not repetitive-motion jobs and did not place undue physical stress

on the worker. The worker's sporting activities actually intensified during the period that the worker claimed that his symptoms were worsening. The impact of these activities, and of the injuries that they entailed, on the worker's condition could not be ignored.

Though the worker saw his doctors on a routine basis, there were only sporadic references to the symptoms being work-related. The worker stopped working in February 1987 but did not claim compensation until April 1987, the same day that he was terminated. The worker was not entitled to benefits. [27 pages]

DECISION NO. 551/90 (03/10/90) Starkman Rao Barbeau

Accident (occurrence).

The worker appealed a decision of the Hearings Officer denying entitlement for a back injury which the worker claimed to have suffered when he fell in an unwitnessed accident.

The Panel noted that at the hearing the worker claimed that he lost consciousness. However, there was no mention of this to examining physicians or at the Hearings Officer hearing. There was little evidence of complaint for one month after the accident. The Panel did not find the worker's evidence to be credible. The appeal was dismissed. [5 pages]

DECISION NO. 564/90 (03/10/90) Stewart Lebert Barbeau

Continuing entitlement - Disc, protruding.

The worker fell and injured his low back in January 1972. He did not seek medical attention until April 1972, however, prior complaints were confirmed by co-workers. A lumbosacral strain was diagnosed in July 1972. The worker's condition did not improve and he was admitted to hospital in September 1972. The worker did not subsequently return to his normal duties, but rather took up lighter janitorial work which he continued until his final lay-off from work in 1984. In 1990, tests confirmed a bulging disc.

The worker was entitled to benefits for one period in 1979, and another in 1980, when he was disabled by his low back condition. The medical evidence indicated that a relationship between the protruded disc and the original accident was possible, considering that hospitalization and a change to lighter work were required. Intervening car accidents affected the worker's neck rather than his low back. Though there was a lengthy period during which medical attention was not sought for the back condition, ongoing difficulties were corroborated by co-workers. [8 pages]

DECISION NO. 577/90 (03/10/90) McGrath Lebert Nipshagen

Accident (occurrence) - Delay (claim).

The worker appealed a decision of the Hearings Officer denying entitlement for a back condition which the worker claimed resulted from an accident at work.

The worker did not claim benefits for four years. There was no corroboration of the accident from co-workers. None of the medical reports at the time indicated that the accident was work related. The appeal was dismissed. [5 pages]

DECISION NO. 633/90I (03/10/90) Starkman Beattie Preston

Permanent disability (loss of body part) - Impairment of earning capacity (loss of teeth) - Maximal medical rehabilitation.

The worker was struck in the face and suffered multiple injuries, including a fractured mandible and a loss of nine lower teeth. He was awarded pensions for various permanent disabilities which totalled 50%. The worker was provided with a lower denture, but he claimed that he could not wear it due to pain.

The worker sought a pension for the loss of his teeth. The opinion of the treating dental surgeon was that maximal medical rehabilitation had not been achieved since the worker had never been assessed with respect to the possibility of having dental implants installed on his lower jaw.

Board policy and the Rating Schedule appeared not to contemplate pensions for loss of teeth. The Panel was satisfied that the Act did not contemplate the awarding of a pension for the loss of a body part, but rather only for a permanent disability which impaired earning capacity. Furthermore, it was preferable to use a whole person concept when assessing the appropriate pension award resulting from a compensable accident.

The Panel required more information as to the availability and desirability of teeth implants in order to determine the issue of whether maximum medical recovery had been achieved. This was so even though the worker had expressed reluctance to undergo any sort of further surgical procedure. Before the Panel could make a final decision, an appointment was to be arranged for the worker to be examined so that a medical opinion could be obtained as to the availability and desirability of implant surgery for the worker. [6 pages]

DECISION NO. 641/90 (03/10/90) Starkman Higson Meslin

Disablement (nature of work).

The employer appealed a decision of the Hearings Officer granting entitlement to a worker for a shoulder condition. The condition was diagnosed a rotator cuff tendonitis. There was also evidence of some degenerative disc disease.

The worker had been a waitress for 30 years before developing the shoulder problem. The job was not repetitive as it involved many different activities. The amount of lifting required was irregular and not excessively heavy. The medical evidence did not establish a definitive connection to work. The appeal was allowed. [5 pages]

DECISION NO. 643/90 (03/10/90) Strachan Ronson Drennan

Commutation (business investment).

A carpenter suffered a back injury for which he was awarded a pension. By means of supplements, the Board helped the worker start a contracting business. The worker wanted full commutation of his pension, valued at about \$70,000, for the purpose of investing it in his business. The worker appealed a decision of the Hearings Officer denying the commutation.

The two main considerations of the Board and the Tribunal in pension commutations are income protection and rehabilitation. Both the Board policy and the Tribunal approach attempt to focus on the effects of the disability. The Board's approach and the Tribunal's approach are consistent.

In this case, the worker was successful in establishing his business. To overcome the effects of his back disability, the business must be sufficiently large and profitable to justify the hiring of persons who

can do the heavy labour and allow the worker to operate mainly in a supervisory capacity. The worker required the commutation to generate the working capital necessary to expand the business.

The Panel concluded that the commutation constituted a rehabilitative measure in the long term interest of the worker which would enable him to maintain suitable employment by reducing the effects of his disability. The appeal was allowed. [8 pages]

Board Directives and Guidelines: Guidelines for the Commutation of Pensions, Board Minute 3, March 20, 1989, p.71

DECISION NO. 492/88R (05/10/90) Strachan Beattie Apsey

Reconsideration.

The worker's request to reconsider Decision No. 492/88 was denied. The Panel had granted temporary benefits from January 1985 but rejected the worker's claim for temporary benefits from February 1984. There was no new evidence submitted by the worker. [4 pages]

WCAT Decisions Considered: Decision No. 95R (1989), 11 W.C.A.T.R. 1; Decision Nos. 72R, 72R2, 492/88

DECISION NO. 14/90R (05/10/90) Strachan McCombie Barbeau

Reconsideration.

The worker's request to reconsider Decision No. 14/90 was denied. In the decision, the Panel granted a 5% pension for a wrist disability. New evidence submitted by the worker did not support a finding of an award in excess of 5%. [5 pages]

WCAT Decisions Considered: Decision No. 95R (1989), 11 W.C.A.T.R. 1; Decision Nos. 72R, 72R2, 14/90

DECISION NO. 66/90 (05/10/90) McGrath Jackson Meslin

Suitable employment.

The worker suffered a compensable back injury in 1986. She was discharged from HRC to modified work in March 1987. The employer offered the worker her regular job, which it claimed was within her medical restrictions. The worker refused. The worker appealed a decision of the Hearings Officer denying temporary benefits subsequent to March 1987.

On the evidence, the work was not within the worker's medical restrictions. Further, the medical restrictions were inadequate, considering the worker's injury. The appeal was allowed. [10 pages]

DECISION NO. 375/90 (05/10/90) Starkman Higson Meslin

Pensions (assessment) (whole person concept) - Pensions (assessment) (psychiatric disability).

The worker appealed a decision of the Hearings Officer granting only a 15% pension for non-organic disability. The worker suffered compensable back injuries in 1969 and 1985. He received pensions totalling 30% for organic back disability and 15% for non-organic disability.

Using a holistic approach, the Panel found that the total pensions of 45% for both organic and non-organic disability correctly reflected the worker's impairment of earning capacity. The Panel noted that this was in excess of the usual maximum of 30% that the Board would grant for disabling chronic pain. [7 pages]

DECISION NO. 415/90 (05/10/90) Starkman Robillard Barbeau

Supplements, temporary - Impairment of earning capacity - Significantly greater than is usual - Availability for employment (job search).

The worker appealed a decision of the Hearings Officer denying a temporary supplement from April 1985 to July 1986.

In November 1987, there was a change in the Board policy regarding the interpretation of the threshold issue concerning supplements. The Panel considered this case using the pre-1987 Board policy since the period in issue was prior to the change in policy.

In determining whether impairment of earning capacity was significantly greater than is usual, the old test was whether the worker was capable of returning to his pre-accident job or a job of comparable income. In this case, the Panel was satisfied that the worker was not capable of returning to his pre-accident job or a job of comparable income. However, the worker was not entitled to a supplement since he was not cooperating with rehabilitation and was not actively looking for suitable work. The appeal was dismissed. [5 pages]

Board Directives and Guidelines: Claims Services Division Manual, s.45(5), p.134, Directive 1

DECISION NO. 573/90 (05/10/90) Robeson Lebert Nipshagen

Continuing entitlement.

The worker suffered a compensable back injury in June 1988 for which he received benefits until October 1, 1988. The worker appealed a decision of the Hearings Officer denying benefits from October 1 until the worker started a new job on October 31, 1988.

The worker's injury responded slowly to treatment and he was unable to return to his former job. The Panel found that the worker was temporarily partially disabled during the period in question and entitled to full benefits. The appeal was allowed. [4 pages]

DECISION NO. 682/90 (05/10/90) Starkman Higson Nipshagen

Supplements, temporary (wage loss).

The worker appealed a decision of the Hearings Officer denying an increase in his temporary wage loss supplement. The worker suffered an injury for which he was awarded a 20% pension. In March 1981, he began a training programme in which he worked 27 hours per week and received a 31.7% supplement. In May 1981, he began working 35 hours per week and the supplement was reduced to 15.6% due to the increase in hours. In March 1984, his hours were reduced to 27 due to a reduced level of funding to the employer. However, the Board refused to increase the supplement back to 31.7%, finding that the decrease in hours was not related to the compensable disability.

The worker submitted that if the Board had offered more rehabilitation assistance, he would not be in this position. The Panel found that the worker did not seek alternative employment or further rehabilitation on his own initiative. In any event, further rehabilitation would probably not have been of assistance to the worker. The Panel also noted that the four year gap in bringing the appeal made it difficult to determine what might have happened.

The appeal was dismissed. [5 pages]

Board Directives and Guidelines: Claims Adjudication Branch Procedures Manual, Document no. 33-20-02

DECISION NO. 51/90 (09/10/90) Onen Beattie Meslin

Continuing entitlement - Pensions (assessment) (back).

The worker suffered a compensable low back injury in August 1987 and received full temporary benefits until December 1987. Thereafter, he only received 50% benefits, since Board doctors stated that the worker was capable of modified employment. The Panel preferred the evidence of the specialist who regularly treated and assessed the worker. Based on his reports, the Panel concluded that the worker was capable of modified employment from December 1987 to January 1988 and from May 1988 onwards. During those periods the worker was only entitled to temporary partial benefits. From January to May the worker was unfit for employment and he was thus entitled to full temporary benefits for that period.

The Panel confirmed the worker's 10% pension assessment. The assessing doctor's findings of the worker's restrictions were consistent with those reported by other doctors and with the worker's own testimony. The only restriction of motion was with respect to forward flexion. [7 pages]

DECISION NO. 558/90 (09/10/90) Starkman McCombie Preston

Class of employer (manufacturing) (pottery) - Class of employer (manufacturing) (plaster statuary).

The employer, a manufacturer of small clay figurines, appealed the confirmation of its placement in Class 6, rate group 153. This group covered the manufacture of "pottery" and also the manufacture of glass products. The employer argued that its end product was virtually identical to that of competitors who were in Class 10, rate group 264, which covered the manufacture of "plaster statuary".

The Panel found that there was very little difference in the production process, or the end product, as between "plaster statuary" and "clay statuary". Moreover, this employer was not involved in the manufacture of "pottery" notwithstanding the presence of that word in its name. The dictionary definition of pottery referred to vessels etc. made of baked clay. The employer produced animal figurines, rather than pots or vessels. There was expert evidence that clay, shale and plaster based products were closely related to each other, but that they were very different from glassware.

This employer's accident experience was far below that of rate group 153. This in itself would not justify a reclassification, if the employer were included in a group of like industries. In this case, the employer's good cost/revenue ratio constituted further evidence that it was improperly grouped with often large, mechanized glass manufacturers.

The appeal was allowed. The employer should be classified under rate group 264. [9 pages]

WCAT Decisions Considered: Decision No. 46/87 (1987), 4 W.C.A.T.R. 319; Decision No. 234/89 (1989), 12 W.C.A.T.R. 181

Regulations Considered: Reg.951, Schedule 1 class 6; Schedule 1 class 10

Board Directives and Guidelines: Operational Policy Manual, Document no. 08-01-04; Employer Assessment

Policies Manual, Document no. 03-01-00

DECISION NO. 649/90 (09/10/90) Kenny Robillard Apsey
Goulet v. Mutch

Section 15 application - Independent operator - Worker (test).

The defendants in a civil action applied to determine whether the plaintiff's right of action was taken away. The issue was whether the plaintiff was a worker or independent operator at the time of a motor vehicle accident.

The plaintiff's husband had a contract with Canada Post to provide certain transportation services. Although the contract was signed by the plaintiff's husband, the contract was in reality the business venture of the plaintiff. She took over the contract and ran the business. Business and government records, except for the contract itself, were in the plaintiff's name. She held herself out as being the person responsible for the business. The plaintiff and her husband had agreed that she should take over the business.

The Panel found that the plaintiff was an independent operator and not a worker of her husband. The plaintiff's right of action was not taken away. [9 pages]

WCAT Decisions Considered: Decision No. 86 (1986), 2 W.C.A.T.R. 52; Decision No. 226/89 (1989), 11 W.C.A.T.R. 307

DECISION NO. 683/90 (09/10/90) Starkman Higson Nipshagen

Heart attack - Presumptions (section 3).

The worker, a car salesman aged 51, sought benefits for a heart attack. As the onset of the worker's condition occurred in the evening, rather than at work, the s. 3(3) presumption did not apply.

Though the work was stressful and the worker had some personality conflicts with his employer, the worker had been doing the job for 20 years and had returned to work for the employer on a number of occasions. Even if on the day of the heart attack the worker did have to brush snow off of 60 cars and realign them in the parking lot, this was within the normal expectations of the job.

The worker had a number of risk factors which contributed to the development of coronary artery disease which precipitated and contributed to the onset of the heart attack. These factors were: the worker's male sex, he was a one pack a day smoker, he was a modestly heavy drinker, suggestions that both of the worker's parents died in their early 70s of heart attacks and evidence of an old anteroseptal myocardial infarction sometime prior to December 1972. The Panel could not find, on the balance of probabilities, that the heart attack was causally related to work. [4 pages]

DECISION NO. 684/90 (09/10/90) Starkman Nipshagen Higson

Issue setting.

The worker was appealing a decision of the Hearings Officer denying temporary benefits subsequent to November 1982. There were other proceedings still before the Board dealing with entitlement for psychogenic disability. The Panel adjourned the hearing. The worker should advise the Tribunal whether it wishes to proceed with the appeal following a Hearings Officer decision on the issue of psychogenic entitlement. [4 pages]

DECISION NO. 725/90 (09/10/90) Kenny Robillard Apsey

Recurrences (compensable injury) (disc, protruding) - Disc, degeneration.

The worker appealed a decision of the Hearings Officer denying entitlement for a lay-off due to back pain in March 1986. The worker had suffered compensable back injuries in 1975, 1977 and 1981.

Disc degeneration is a normal process occurring with ageing. Attacks of back pain from an underlying degenerative condition may occur with increasing frequency and duration as the person continues to age. It is, therefore, often difficult to determine whether a person's condition is related to the underlying condition or whether an accident has changed the underlying condition so as to make the accident a significant cause of future symptoms.

In this case, the Panel found that the 1975 accident was relatively serious. Although the worker was able to return to work after all the accidents, there was continuity of treatment and complaint. The symptoms in 1986 were similar to those experienced in the other accidents. Disc protrusion was diagnosed in 1975 and 1981.

The Panel concluded that the 1975 accident was a significant cause of the back condition in March 1986. The appeal was allowed. [9 pages]

DECISION NO. 279/90R (10/10/90) Starkman Lebert Preston

Reconsideration.

The worker's request to reconsider Decision No. 279/90 was denied. In the decision, the Panel ordered the worker to attend a medical examination in another city after being advised by the worker's family doctor that he was capable of travelling. The worker submitted a letter from a chiropractor stating that the worker could not travel. The Panel preferred the evidence of the family doctor. There was reason to doubt the correctness of the original decision. [4 pages]

WCAT Decisions Considered: 279/90

DECISION NO. 514/90 (10/10/90) Marcotte Drennan Jago

Continuity (of treatment) - Tear (meniscus).

The worker appealed a decision of the Hearings Officer denying entitlement for surgical repair of a torn meniscus in January 1987. The worker suffered compensable knee injuries in September, October and November 1983. The worker's doctors supported a relationship between the compensable accidents and the torn meniscus. Board doctors did not support a relationship. However, the Board doctors appeared to consider the October 1983 accident only which involved a jarring of the knee and did not consider the other accidents which involved striking of the inner aspect of the knee.

The Panel found that the torn meniscus was compatible with the compensable accidents. Although there were some gaps in seeking treatment, there was, generally, continuity of treatment. The Panel concluded that the compensable accidents were significant contributing factors to the torn meniscus. The appeal was allowed. [10 pages]

DECISION NO. 539/90 (10/10/90) Starkman Higson Jago
Bell v. Gauthier

Section 15 application - Corporation (amalgamation).

The defendants in a civil action applied to determine whether the plaintiff's right of action was taken away.

The defendants were a long distance truck driver and the company that owned the truck. The Panel found that the driver was a worker. He was hired as a worker of one company. That company was bought out by the defendant company. The Panel could have used more evidence regarding the amalgamation but decided the case on the basis of the available evidence. The plaintiff's right of action was taken away. [8 pages]

WCAT Decisions Considered: 775/89

DECISION NO. 638/90 (10/10/90) McIntosh-Janis Drennan Nisphagen

Psychotraumatic disability - Chronic pain.

The worker suffered a back injury for which she was awarded a 10% pension. The worker appealed a decision of the Hearings Officer denying entitlement for psychotraumatic disability or chronic pain.

The worker was suffering from anxiety and depression with increased tension, nervousness, sleep difficulties, decreased appetite and crying episodes. The Board considered a number of factors in denying entitlement such as no possible return to work, malingering, secondary gain factors and the nature of the original injury.

The majority of the Panel reviewed the factors considered by the Board and found that they were not a bar to the worker's claim. There were no serious financial repercussions to the inability to return to work since the worker's husband was earning an adequate income. There were no substantial references to malingering. Secondary gain factors did not bar compensation in principle. The original injury was not frightening but this did not disentitle the worker from benefits for a psychological condition developing from it. Considering the remaining medical reports, the majority found that the psychological condition resulted from the compensable accident.

The worker was entitled to benefits for psychotraumatic disability. The worker was not entitled to benefits for chronic pain since pain was not the predominant factor. The appeal was allowed.

The Employer Member, dissenting, found that the work accident was not a significant contributing factor to development of the psychological condition. [11 pages]

WCAT Decisions Considered: Decision No. 915 (1987), 7 W.C.A.T.R. 1

DECISION NO. 666/90 (10/10/90) Onen Ferrari Apsey

Industrial disease (removal from exposure) - Breathlessness - Arrhythmia.

A steelworker appealed a decision of the Hearings Officer denying entitlement for shortness of breath and arrhythmia. The worker claimed that these conditions were related to work, particularly work as a tripper car operator.

Section 1(1)(n)(iii) provides that industrial disease includes a condition that requires that the worker removed from exposure to a substance because the condition may be a precursor to an industrial disease.

The worker had been complaining of symptoms for a number of years. However, he had been able to continue to work full time in work that required physical exertion. Numerous medical tests were negative. Although there was some pleural thickening in the lungs, this was not at this point a condition which could reduce lung function. Heart and lung function was within normal limits. Some doctors suggested anxiety as an explanation for the worker's condition.

The Panel could not find that the worker was disabled from working or that he had a condition related to his employment. The evidence did not support any disease process which could cause lung limitation. The pleural plaques was a preliminary finding and may mean nothing in the long term.

The appeal was dismissed. [10 pages]

DECISION NO. 756/90 (10/10/90) Starkman Drennan Chapman

Supplements, older worker.

A truck driver suffered a back injury in 1983 for which he was awarded a 10% pension. He appealed a decision of the Hearings Officer denying an older worker supplement from January 1986 until September 1987.

The worker was 64 years old in January 1986. Considering his age, education, long work history as a truck driver and the physical restrictions resulting from the compensable injury, the Panel was satisfied that the worker could not return to his pre-accident job and would be unlikely to benefit from vocational rehabilitation.

The worker was entitled to the supplement. The appeal was allowed. [5 pages]

Board Directives and Guidelines: Claims Adjudication Branch Procedures Manual, Document no. 33-20-02

DECISION NO. 764/89 (11/10/90) Chapnik Lebert Meslin

Credibility (conflict with other witnesses) - Evidence (corroboration) - Travel expenses.

The worker was entitled to benefits for accidents occurring at work. He had been denied entitlement on the basis of statements of a co-worker who denied knowledge of the accidents.

The worker claimed that he was struck by a truck's vacuum hose that was clogged with ore and weighed 200 pounds. The worker claimed that the co-worker pushed the hose causing the ladder that had been supporting the hose to topple, which in turn caused the hose to strike the worker.

The worker produced a new witness, a third worker, who was able to corroborate several of the worker's previously unsubstantiated statements, including, the need to support the hose, the fact that the truck was malfunctioning and that the worker reported the injury the same evening. The third worker was a credible witness who was a neutral observer and was knowledgeable about the workings of the truck. His evidence as to the work site circumstances, which could have led to the accident as described by the worker, was thus accepted. The third worker came to the hearing from Edmonton Alberta. Since his evidence was essential in order for the worker to prove his case, he was to be reimbursed for his travel expenses. [9 pages]

WCAT Decisions Considered: Decision No. 764/89

DECISION NO. 161/90 (11/10/90) Carlan Beattie Jago

Disablement (repetitive work).

The worker appealed a decision of the Hearings Officer denying entitlement for a left shoulder and neck and for a right hand condition. On the evidence, the Panel found that the conditions were related to repetitive movements at work. The appeal was allowed. [7 pages]

DECISION NO. 210/90R (11/10/90) Onen Klym Nipshagen

Reconsideration.

The employer's request that the Tribunal reconsider its Decision No. 210/90 was denied. That decision had dismissed the employer's application for an examination of the worker pursuant to s. 21 of the Act, on the basis that the employer's concerns about credibility and conflicting descriptions of the accident could be answered without the examination.

The request to reconsider was based on the employer's belief that at the time of the original hearing the worker was not in receipt of compensation benefits, but now was. The question of whether the worker was receiving benefits at the time of the original hearing was not significant. Any possible change in payment of benefits did not lead to reconsideration of the decision. [3 pages]

WCAT Decisions Considered: Decision No. 95R (1989), 11 W.C.A.T.R. 1, Decision Nos. 72R, 72R2

DECISION NO. 453/90 (11/10/90) Chapnik Fox Apsey

Continuity (of treatment) - Disablement (repetitive work).

The worker suffered a shoulder strain in November 1980 and received benefits until January 1981. The worker appealed a decision of the Hearings Officer denying benefits in November 1985 for shoulder pain.

Considering lack of continuity of treatment, the Panel found that the 1985 lay-off was not related to the 1980 accident. However, the 1985 lay-off was a disablement from the nature of excessive and repetitive arm movement in work that the worker was doing that day. [8 pages]

DECISION NO. 575/90 (11/10/90) Chapnik Barbeau Cook

Supplements, older worker (age) - Board Directives and Guidelines (supplements, older worker).

The worker, who was born in February 1941, was receiving a 15% pension for a back injury sustained in July 1986. He sought an older worker supplement for the period from April 1988 to July 1989.

The worker had a grade eight education and an extensive employment background, including experience in auto mechanics and in business. The medical evidence showed that he was able to perform modified work with some restrictions. The worker was able to engage in activities such as travelling 40 miles three times weekly for chiropractic treatment, do shopping and fix a friend's air conditioner. Yet, at one point he stated that he was unwilling to travel any distance at all to attend a rehabilitation programme and he made to attempt at suitable work made available through a friend.

The worker's age was not a significant factor to his unemployability, nor had it been shown that the worker was unlikely to benefit from a vocational rehabilitation programme. The worker had simply refused to co-operate in such a programme and had totally removed himself from the workforce by his own choosing. He was not entitled to an older worker supplement. [8 pages]

WCAT Decisions Considered: Decision No. 320/88 (1988), 9 W.C.A.T.R. 292

Board Directives and Guidelines: Operational Policy Manual, Document No. 05-03-09; Claims Adjudication

Branch Procedures Manual, Document No. 33-20-17

DECISION NO. 623/90 (11/10/90) Robeson Cook Jago

Access to worker file, s. 77.

Access to the worker file was granted to the employer. [4 pages]

DECISION NO. 667/90 (11/10/90) Kenny Drennan Preston

Pensions (arrears).

In 1957, the worker was awarded a 30% pension for a back injury. In 1964, he was awarded a 50% pension for a wrist injury. In 1981, the back pension was increased to 40% and the wrist pension was increased to 60%. The worker appealed, claiming that the increases should have covered the period from 1964 to 1981 as well.

There was no reason to doubt the correctness of the 80% total pension rating prior to 1981. Contrary to the assertions of the worker, there had been deterioration of his condition between 1964 and 1981. In 1964, reflexes had been normal. In 1981, left knee jerk was sluggish and neither ankle nor knee jerk could be obtained in the right leg. There was also evidence of circulatory impairment in both legs and mild pitting edema in 1981. With respect to the wrist, there was significant wasting of arm musculature and shoulder stiffness was reported for the first time in 1981.

The appeal was denied. [6 pages]

WCAT Decisions Considered: Decision No. 915 (1987), 7 W.C.A.T.R. 1

DECISION NO. 692/90 (11/10/90) Robeson Fox Jago

Access to worker file, s. 77.

Access to the worker's file was granted to the employer. Regarding the worker's concerns as to privacy, the Panel noted that the Board recently adopted a new policy regarding disclosure of the information in the file. [3 pages]

DECISION NO. 885/89 (12/10/90) Carlan Fox Seguin

Employment (seasonal) - Earnings basis (short or casual employment).

The worker suffered an accident in December 1981 for which he was awarded a 25% pension. The worker

appealed a decision of the Appeals Adjudicator regarding the earnings basis for calculation of the worker's pension.

The Board found that the worker was a seasonal employee. It therefore averaged his earnings over the 12 months preceding the accident. The Panel found that the worker was not a seasonal employee. He did not have steady work which lasted for a number of years but he did work consistently throughout the year for a variety of people. There were no seasonal or regular lay-off or periods of unemployment. Accordingly, his earnings basis should be calculated on the basis of his actual periods of employment in 1981.

In 1981, the worker was disabled for non-compensable reasons from January to June. His earnings should be calculated on the five months of work from June to December. The appeal was allowed. [5 pages]

Board Directives and Guidelines: Claims Adjudication Branch Procedures Manual, Document no. 33-08-07

DECISION NO. 690/90 (12/10/90) Robeson Fox Jago

Access to worker file, s. 77.

Access to the worker's file was granted to the employer, except for documents which had been identified as irrelevant by the Board. [3 pages]

DECISION NO. 1043/89 (15/10/90) Kenny Jackson Jago

Pensions (arrears).

The worker suffered a shoulder injury in 1973 and a further shoulder injury in 1977. In 1984, he was awarded a pension retroactive to 1980, which was the date on which shoulder complaints increased. The worker appealed a decision of the Hearings Officer denying arrears to the date of the accident in 1973.

The worker was able to return to heavy work after the 1973 accident. There was a lack of medical evidence of clinical findings from 1974 to 1977. After the 1977 accident there was reported restriction of shoulder movement. This restriction was similar to restriction noted in 1980. The Panel found that the worker was entitled to a pension from the time of the accident in 1977.

The appeal was allowed in part. [7 pages]

WCAT Decisions Considered: 175/87, 468/88, 686/88, 39/89

Board Directives and Guidelines: Claims Adjudication Branch Procedures Manual, Document no. 33-20-01

DECISION NO. 22/90 (15/10/90) Starkman Cook Jago

Subsequent incidents (outside work) - Aggravation (compensable injury) (epicondylitis) - Epicondylitis.

The worker suffered compensable tennis elbow from repetitive hammering in 1983. In 1987, the worker reinsured his elbow while pulling on a fence in an incident outside work. The worker appealed a decision of the Hearings Officer denying entitlement for the incident in 1987.

On the evidence, the worker continued to suffer from elbow problems after the 1983 accident. Medical evidence supported the worker's claim that the pulling incident aggravated the preexisting symptomatic condition. The appeal was allowed. [9 pages]

DECISION NO. 64/90 (15/10/90) Bradbury Beattie Preston

Aggravation (preexisting condition) (disc, degeneration) - Disablement (strenuous work) - Transportation industry (bus driver).

A bus driver suffered a compensable injury in June 1985 when he had to turn the wheel of his bus rapidly to avoid a collision. He was off work for two months. In September 1987, the worker suffered a sudden onset of back pain while stepping out of the bus. The worker appealed a decision of the Hearings Officer denying entitlement for 1987 incident.

There was a diagnosis that the worker suffered a back strain in the 1985 accident. However, the Panel preferred the opinion of a s.86h assessor that the worker suffered an aggravation of preexisting degenerative disc disease. This opinion was based on symptoms in the leg of numbness and tingling.

The worker's job was strenuous, requiring twisting and turning. The Panel found that the mechanics of the worker's job contributed to continuing pain since 1985. The 1987 accident was a further aggravation of the worker's underlying condition.

The worker was entitled to benefits for the 1987 accident. The appeal was allowed. [9 pages]

DECISION NO. 115/90 (15/10/90) Starkman Lebert Jago

Cataracts - Welding - Medical opinion (cataracts) (welding).

The worker appealed a decision of the Hearings Officer denying entitlement for cataracts. The worker was a welder with exposure to ultraviolet light, infrared light and flashes from 1964 to 1982. He wore safety goggles while performing his work but often received flashes from the work of other welders.

Epidemiological and other literature was inconclusive as to a relationship between such exposure and cataracts. Most of the studies appeared to involve considerably more exposure than the worker. On the basis of the studies presented, the Panel could not conclude that there was a causal link between welding and cataracts. The appeal was dismissed. [7 pages]

DECISION NO. 685/90 (15/10/90) Starkman Higson Nipshagen (dissenting)

Rehabilitation (cooperation).

The worker suffered a low back injury in 1972. In 1979, he was awarded a 20% pension retroactive to 1976. The worker appealed a decision of the Appeals Adjudicator granting only 50% temporary partial disability benefits from December 1977 to August 1978.

The majority of the Panel found that the worker was temporarily partially disabled during this period and that he cooperated with medical and vocational rehabilitation. The worker was entitled to full benefits during this period. The appeal was allowed.

The Employer Member, dissenting, found that the worker was not disabled beyond his pension level. [6 pages]

DECISION NO. 700/90 (15/10/90) Hartman Fox Meslin*Accident (occurrence).*

The worker appealed a decision of the Hearings Officer denying entitlement for a back injury. Considering numerous inconsistencies in the worker's evidence, the Panel found that the disability was not work related. The appeal was dismissed. [7 pages]

DECISION NO. 746/90 (15/10/90) Kenny Jackson Apsey*Pensions (assessment) (back).*

The worker suffered a low back injury in 1959. In 1961, he was awarded a 10% pension. In 1973, it was raised to 20%. It was confirmed in reassessments in 1979 and 1987. The worker appealed a decision of the Hearings Officer denying an increase in his pension. The worker claimed that his condition had deteriorated since 1987.

A comparison of the 1987 assessment and subsequent reports of an orthopaedic surgeon showed that the physical findings were very similar. The worker's range of movement was one-third to one-half of normal, with slight limitation of leg raising and sluggish ankle reflex but, otherwise, no other evidence of nerve root tension and no objective neurological findings.

The Panel found that the 20% award was correct. The appeal was dismissed. [6 pages]

DECISION NO. 848/88 (17/10/90) Sandomirsky McCombie Nipshagen*Temporary total disability - Suitable employment.*

The worker suffered a compensable back injury in October 1978. In April 1979 she was discharged from HRC to modified work. She returned to very light work in May 1989 but laid off again after a few hours. In May 1980 she was awarded a 15% pension for low back disability with full retroactivity. In 1986 she was awarded a 10% pension for non-organic disability with full retroactivity. The worker appealed denial of temporary total disability benefits from May 1979 to May 1980.

When the Board grants benefits retroactively, it is difficult to assess the degree of disability during a period when no entitlement was originally recognized. In this case, it appeared that if the Board had recognized the worker's psychological disability when she was at HRC, she would likely have received treatment for the disability before being considered fit for work. The Panel found that the worker had not achieved maximal medical rehabilitation during the period in question, considering evidence of improvement in the worker's psychological condition in 1984. The worker was therefore entitled to temporary benefits during the period in question.

Since the worker was unable to perform even the very light work that the employer offered in 1979 due to her back pain and nervous condition, the Panel concluded that there was no work that the worker would have been able to do. Therefore she was temporarily totally disabled. The appeal was allowed. [7 pages]

WCAT Decisions Considered: 848/88L, 848/88LF

DECISION NO. 585/90 (17/10/90) Robeson McCombie Jago*Continuity (of complaint).*

The worker suffered a neck injury in July 1986 and was off work until August 1986. The worker appealed a decision of the Hearings Officer denying entitlement for further neck pain in May 1988. On the evidence, there was continuity of complaint and treatment. The Panel found that the worker aggravated his compensable condition in 1988. The appeal was allowed. [5 pages]

DECISION NO. 663/90 (17/10/90) Sandomirsky Lebert Meslin*Temporary disability (beyond pension level).*

The worker suffered a low back injury in 1963, for which he was awarded a 10% pension in 1967, increased to 20% in 1978 and to 30% in 1985. In addition, he received a 25% pension for psychological disability. The worker appealed a decision of the Hearings Officer denying entitlement to temporary benefits from August 1987 to July 1988 and denying entitlement for a neck disability.

Medical reports and the worker's own description of his symptoms indicated that his condition had not changed significantly since 1985. The Panel found that the worker was not disabled beyond his pension level.

Medical evidence did not support a relationship between the accident and the neck condition. The appeal was dismissed. [6 pages]

DECISION NO. 204/89 (18/10/90) Strachan Lebert Jewell*Pensions (lump sum) (ten per cent pension) (advantage to worker).*

A bakery worker suffered a back injury for which she was awarded a 10% pension. She appealed a decision of the Hearings Officer denying commutation of the pension. The worker wanted the pension to buy a vehicle and certain equipment which would assist her in obtaining employment as a dog groomer.

Section 45(4) of the pre-1989 Act applied since the pension was for 10%. The worker testified that having her own vehicle would reduce travel time to work and that this would have medical advantages. In addition, the equipment (an adjustable table and chair) would lessen strain on her back while grooming dogs. The evidence did not indicate that the commutation would not be to the advantage of the worker. The worker was entitled to the commutation. [7 pages]

WCAT Decisions Considered: Decision No. 223/89 (1989), 11 W.C.A.T.R. 302; Decision No. 699/89

DECISION NO. 211/89 (18/10/90) Onen Lebert Jewell*Continuity (of symptoms) - Consequences of injury (altered gait).*

The worker suffered neck injuries in 1969 and 1971 and a knee injury in 1975. The worker appealed a decision of the Hearings Officer denying continuing entitlement for his neck condition.

The worker began complaining again of neck pain in 1980. On the evidence, the Panel found that the original accidents were minor in nature and resolved. Except for the worker's testimony, there was a lack of continuity of complaint, treatment and disability.

The Panel accepted medical opinion that altered gait from the 1975 knee injury would not affect the neck since energy is absorbed as it moves up the spine and would be fully dissipated by the time the cervical area is reached.

The Panel concluded that the worker's cervical disc disease was not related to the accidents in 1969 and 1971 or the accident in 1975. The appeal was dismissed. [13 pages]

DECISION NO. 240/89 (18/10/90) Onen Cook Nipshagen

Heart attack - Presumptions (section 3).

The worker's widow appealed a decision of the Hearings Officer denying dependency benefits for the worker's fatal heart attack. The worker was a heating journeyman who died while working alone at a work site. Medical investigations following his death showed that the worker had severe arteriosclerosis and that he died of cardiac arrhythmia due to coronary thrombosis.

The Panel found that the heart attack was an accident in the course of employment. However, the heart attack did not arise out of employment. The commonest cause of heart attack is a sudden thrombosis within the artery which is completely independent of any activities. A smaller percentage of heart attacks occur during heavy physical exertion when the heart muscle demands more oxygen than can be delivered by the narrowed artery. In such instances, symptoms of infarction (damage to the heart muscle) would be expected.

In this case, the worker suffered a thrombosis unrelated to physical activity. The evidence also indicated no damage to the heart muscle.

The presumption clause in s.3(3) did not help the appellant in this case. The evidence was clear and left the Panel with no doubt that there was no relationship between the thrombosis and employment. The appeal was dismissed. [8 pages]

Board Directives and Guidelines: Claims Services Division Manual, s.1(1)(a), p.8, Directive 6

DECISION NO. 859/89 (18/10/90) Carlan Beattie Seguin

Chronic obstructive lung disease - Exposure (dust) - Medical opinion (chronic obstructive lung disease) - Construction (drilling) (air track) - Mining - Smoking - Pensions (AMA Guides) (respiratory disease) - Pensions (assessment) (chronic obstructive lung disease) - Administrative Fund (transfer of costs) - Parties (of record) (previous employers) - Intervenor.

The worker appealed a decision of the Hearings Officer denying entitlement for chronic obstructive lung disease (COLD). The worker had been a miner for many years. Then, he became an air track driller for a construction company. The construction company was the accident employer.

The Panel dealt with a number of preliminary matters.

In Decision No. 859/89I, the Panel invited submissions from the Ontario Mining Association to represent the interests of the previous mining employers since the Panel believed that none of them were still in existence. The Panel was informed of an existing previous employer for whom the worker worked for about six months in 1960. This employer received very little notice of the hearing. However, it was unlikely that there would be any financial implications for this employer and the Panel decided that it would be appropriate to transfer any such costs to the Administrative Fund.

The Panel refused to allow the Council of Ontario Construction Associations to intervene. Intervenor are not generally appropriate in the adjudication of individual claims. In this case, the accident employer was a construction company and it ably represented the interests of the construction industry.

The worker was severely disabled by COLD. He was exposed to dust in the workplace, both in mining and in construction. He was also a light smoker.

Epidemiological evidence can be an important part of the evidence used to decide entitlement in an individual case. However, entitlement cannot be dependent exclusively on such evidence. Epidemiological evidence takes so long to develop and is so dependent on financial contingencies that its absence cannot be treated as determining that no causal relationship exists.

The epidemiological evidence was not definitive but there were indications of a relationship between dust exposure and COLD and that risk increased with greater smoking. In this case, the worker was a light smoker, so that smoking would be a less important factor. The Panel concluded that dust exposure at work was a significant contributing factor in development of the disease and that the worker was entitled to benefits.

Due to delay in completing adjudication of the claim, the Panel decided to rate the worker's pension itself, using the AMA Guides for respiratory impairment. The Panel found that the worker was in the upper ranges of Class 4 of the AMA Schedule and entitled to a 100% pension. [22 pages]

WCAT Decisions Considered: Decision No. 94/87 (1987) 11 W.C.A.T.R. 20; Decision No. 257/89 (1990), 14 W.C.A.T.R. 87; Pensions Assessment Appeals Leading Case Interim Report (1986), 7 W.C.A.T.R. 365; Decision No. 859/89

DECISION NO. 242/90 (18/10/90) Signoroni Jackson Meslin

Credibility - Disability (disabled from working).

The worker claimed benefits for a headache condition. In December 1986, a few pieces of lumber that had been leaning against a wall fell and the worker was struck on the head. The worker went to see his family doctor on the day of the accident, but did not seek further medical attention until August 1987, a few days before he discontinued employment. Following that time, he received regular treatment until his condition stabilized.

Though the medical literature referred to post-traumatic headache that could be brought on by minor accidents, in this case there were no objective medical findings to support the worker's claim.

Considering evidence of headaches prior to the accident, the minor nature of the injury, the long period without medical attention, the absence of complaint to the foreman and the worker's lack of credibility as a witness, there was no reliable and persuasive evidence establishing either that the worker's symptoms were disabling or that the accident was a significant contributing factor to the condition. The worker was not entitled to benefits. [9 pages]

DECISION NO. 386/90 (18/10/90) Moore Ferrari Ronson

Aggravation (preexisting condition) (disc, degeneration) - Continuing entitlement - Apportionment - Multiple causes.

The worker suffered a back injury in November 1981, for which he received benefits until January 1983. The worker appealed a decision of the Appeals Adjudicator denying entitlement subsequent to January 1983.

The worker suffered a previous compensable back injury in 1972. At that time he had preexisting degenerative disc disease. On the evidence, the Panel found that the worker continued to suffer after January 1983 from the combined effect of the underlying disc degeneration and a soft tissue or mechanical problem resulting from the compensable accident.

Board policy provides that where compensable and preexisting conditions contribute to an ongoing disability, continuing benefits will be paid commensurate with the degree of remaining compensable disability. This is the test that the Board should have applied in January 1983. It seemed to the Panel

that the degree of remaining disability in this case should be measured by the ability of the worker to perform pre-accident employment. This was a reasonable standard since pre-accident employment was what the worker was capable of doing while he was affected solely by the preexisting condition.

Prior to the 1981 accident, the worker was capable of working continuously without treatment. After the accident, he was able to work only sporadically. The worker continued to suffer the disabling effects of the 1981 injury after January 1983 and, therefore, continued to be disabled by a compensable injury.

A previous Tribunal decision found that the Board policy was inconsistent with the Act because it resulted in apportionment. In the present case, the remaining compensable disability was the full degree of the worker's temporary disability. Therefore, it was unnecessary to consider apportionment.

The worker was temporarily partially disabled and was not disentitled from receiving full benefits. The appeal was allowed. [7 pages]

WCAT Decisions Considered: 294/89

Board Directives and Guidelines: Claims Adjudication Branch Procedures Manual, Document no. 330-2-20

DECISION NO. 401/90 (18/10/90) Starkman Ferrari Preston

Accident (occurrence).

The employer appealed a decision of the Hearings Officer granting the worker benefits for a low back condition, which the worker claimed resulted from lifting a heavy door at work. The employer claimed that the back condition resulted from painting and wallpapering that the worker did at home the previous weekend.

The worker and his family denied that the worker did any of the painting or wallpapering. The worker's supervisor testified that she met the worker on the bus and the worker told her that his back was sore due to work at home. However, a co-worker did not recall any such conversation.

The Panel was not satisfied that it had been shown that the accident occurred at home. The Panel was satisfied that the lifting of doors at work could cause a back injury, that the worker reported pain to co-workers and sought immediate medical attention. The worker was entitled to benefits. The appeal was dismissed. [5 pages]

DECISION NO. 664/90 (18/10/90) Onen Higson Barbeau

Continuity (of treatment).

The worker suffered a back injury in December 1967 and a recurrence in January 1968. His condition deteriorated in 1985. The worker appealed a decision of the Hearings Officer denying benefits for the back condition in 1985.

The worker was able to work from 1968 to the 1980s. Treatment during those years was sporadic at best. The appeal was dismissed. There was indication that the condition might be related to accidents at work in 1985 but this issue was not before the Panel. [7 pages]

DECISION NO. 671/90I (18/10/90) Onen Jackson Meslin

Psychotraumatic disability - Chronic pain - Drug abuse.

The worker appealed decisions denying entitlement for psychological disability or chronic pain and

denying a pension supplement. The worker suffered a low back injury in May 1981. He returned to work in July 1981 but continued to suffer from pain. Initial diagnosis was lumbar strain but this was changed to facet joint strain, a mechanical back pain. The worker began to develop a drug dependency because of the medication he was taking.

The worker clearly suffered from an organic problem, for which he had been awarded a 15% pension. Based on the medical evidence, the Panel found that the worker also suffered from psychogenic pain. The reports also indicated that the worker did not suffer from a recognizable psychiatric illness. This psychogenic pain resulted from the compensable accident. There were detailed reports from the company nurse which showed the development of the chronic pain condition, as well as development of drug dependency, resulting emotional stress and disruption of personal life.

The emergence of chronic pain and the drug dependency were intertwined. The drug dependency and the side effects of the drugs were related to the compensable accident.

In the Review of Decision Nos. 915 and 915A, the WCB board of directors indicated that, in cases of mixed pain where the predominant cause of the pain is organic, the Board compensates under the Rating Schedule for organic injury. The award would reflect full compensation for pain impairment from a combination of organic and psychogenic sources.

The Panel found that the worker's pain was predominantly organic but that he also suffered from psychogenic pain and drug dependency related to the compensable accident. The Board awarded the worker a 15% pension for organic disability only, having excluded any entitlement for pain magnification. Therefore, the worker should be reassessed to include the psychogenic pain. After the reassessment, the case should be referred back to the Panel to consider the issue of supplementary benefits. [14 pages]

Board Directives and Guidelines: Chronic Pain Disability Policy, Board Minute 2, July 3, 1987, p.5196

Cases Considered: Review of Decision Nos. 915 and 915A (WCB Bd. of Directors) (June 1, 1990)

DECISION NO. 831/88F (19/10/90) Starkman Lebert Barbeau

Pensions (assessment) (enhancement factor) - Pensions (assessment) (whole person concept) - Board Directives and Guidelines (pensions) (enhancement factor).

The Panel considered the question of multiple factors for pensions, pursuant to Decision No. 831/88. The worker received a 5% pension for a left shoulder disability, a 7% pension for a left knee disability, a 5% pension for a right knee disability, a 2% pension for a right foot disability, a 15% pension for psychotraumatic disability and a 2.5% multiple factor for bilateral knee disability. The multiple factor was calculated as one-half of the value of the lesser knee disability.

Correspondence received from the Board stated that percentages in the Rating Schedule represent the impairment of earning capacity of the average worker when a disability exists alone in an otherwise healthy body. If the whole person concept were applied correctly, there would be a lower overall rating for multiple disabilities. However, the Board does not apply the principle strictly for multiple disabilities. Rather, the individual disabilities are added. For certain types of injuries where there is a clear synergistic effect, the Board has determined that the impact of multiple disabilities is greater than for other types of multiple disabilities that do not have such a strong functional relationship.

The Panel found that the Board policy for multiple factors applies when a disability exists bilaterally in limbs. There appeared to be a direct functional relationship between the foot and the knee and, for this reason, it was appropriate to consider the entire limb. Accordingly, the worker had a 7% disability for his left limb and a 7% disability for his right limb (5% for the knee and 2% for the foot) and, therefore, the multiple factor should have been 3.5% (one-half of 7%).

The worker withdrew his appeal regarding the broader issue concerning the application of multiple factors between other parts of the body. The appeal was allowed in part. [5 pages]

WCAT Decisions Considered: Decision No. 831/88 (1989), 10 W.C.A.T.R. 334

DECISION NO. 879/88LR (19/10/90) Onen Lebert Nipshagen

Reconsideration (consideration of evidence).

The Appeals Adjudicator denied the worker's claim that his left knee injury was caused by a work accident in 1980, by the nature of the worker's employment in 1980 or that the injury was an aggravation of a previous compensable injury in 1978. On appeal to the Appeal Board, it was found that the injury was not related to an accident in 1980 or the nature of work in 1980. In Decision No. 879/88L, the Tribunal denied leave to appeal. The worker requested that the Tribunal reconsider its decision.

The Panel noted that the Appeal Board did not consider the issue of entitlement on the basis of aggravation of the 1978 injury. Accordingly, leave to appeal was not required on that issue.

It appeared that the Panel in Decision No. 879/88L did not consider the effect of the outstanding issue which had not been decided by the Board. Any consideration of the issue of whether the 1980 injury was due to the 1978 accident would require a review of the facts of the accident or disability which developed in 1980. However, the Tribunal would be foreclosed from deciding these facts because leave was denied. Therefore, the Panel decided that the Tribunal should reconsider Decision No. 879/88L. [5 pages]

WCAT Decisions Considered: 879/88L

DECISION NO. 1027/89 (19/10/90) Onen Jackson Robson

Earnings basis (learner) - Earnings basis (nominal remuneration) - Worker (learner) - Worker (probationary employee) - Words and phrases (nominal remuneration, s.43(6)).

The worker appealed the calculation of his earnings. He contended that his actual \$6.50 per hour wage rate at the time of the accident did not fairly represent his salary, since it was his remuneration only during a training period to become a merchandise manager with the employer, a drug store. The injury occurred during the worker's three month probationary period. The employment was terminated shortly after the injury.

The Panel found that the worker was hired as a merchandising clerk, with the possibility that he would be selected for further training after his probation. The worker was thus "learning a trade, occupation, profession or calling" within the meaning of s. 43(6) of the pre-1989 Act.

Opportunities for advancement may well have been stressed at the time of hiring, nevertheless, despite the worker's honest belief that he was a management trainee, that was not the case. The Panel found that a "fair and equitable" remuneration for the worker, under s.43(6), would be \$7.50 per hour as a fully trained clerk. The worker's actual earnings of \$6.50 per hour were "nominal", for the purposes of s. 43(6), in comparison to the \$7.50 rate. Though the actual amount of the difference did not appear significant on its face, it did represent a 15% difference. Clerical employment in a drug store was not a highly remunerative occupation and it encompassed only a narrow range of salaries. In a higher-paying occupation, the 15% difference would represent a larger actual amount.

Section 43(6) applied to this worker, since he was injured while training for a job which promised some advancement and for which he had thus accepted a lower rate of pay.

The Panel found that the worker was not dismissed for incompetence as claimed by the employer. Whether or not the worker was dismissed because of the injury, the termination was for circumstances beyond the worker's control. Thus even though the worker did not complete the probationary period, he was none the less entitled to have his earnings calculated under s. 43(6) at the rate of \$7.50 per hour. [15 pages]

DECISION NO. 691/90 (19/10/90) Robeson Fox Jago

Access to worker file, s. 77.

Access to the worker's file was denied. The employer indicated to the Tribunal that the issue in dispute was SIEF relief. However, the Board had considered the relevance of the documents to the issue of continuing entitlement. [3 pages]

DECISION NO. 705/90 (19/10/90) Faubert Cook Ronson

Withdrawal (of application).

The employer's application for an order requiring the worker to attend a medical examination was withdrawn. The employer received the information it wanted concerning the worker's condition and medical restrictions from an assessment at HRC. [4 pages]

WCAT Decisions Considered: Decision No. 696/88 (1989), 10 W.C.A.T.R. 308; Decision No. 981/87

DECISION NO. 708/90 (19/10/90) Robeson Fox Chapman

Access to worker file, s. 77.

Access to the worker's file was granted to the employer, except for documents identified as irrelevant by the Board. [4 pages]

DECISION NO. 720/90 (19/10/90) Onen Ferrari Barbeau

Access to worker file, s. 77.

Access to the worker's file was granted to the employer. [4 pages]

DECISION NO. 721/90 (19/10/90) Onen Ferrari Barbeau

Withdrawal (of appeal).

The worker's request to withdraw his appeal was granted. The worker had a new understanding of the facts and would not be bringing an appeal again on this issue.

The Panel noted that requests for withdrawal should be made as early as possible. Once an appeal is scheduled, the parties and the Tribunal have already expended considerable time, money and effort to prepare the case. [4 pages]

DECISION NO. 737/90 (19/10/90) Signoroni Robillard Apsey
Mr. Gallant Cleaning and Restoration Services (Winsor) Ltd. v. Beliveau

Section 15 application - Executive officers.

The defendants in a civil case applied to determine whether the plaintiff's right of action was taken away. The issue was whether the defendant was a worker or an executive officer at the time of a motor vehicle accident.

The defendant started work with the employer as a labourer. At the time of the accident, she was the manager of one of four divisions in the company. In addition to the managerial duties, she performed estimator's duties and other odd tasks. Executive functions were performed by the owner and also by the vice-president and manager of marketing.

The Panel concluded that the defendant was a worker. The plaintiff's right of action was taken away. [7 pages]

DECISION NO. 925/88R (23/10/90) Kenny Robillard Seguin

Reconsideration.

The worker's request to reconsider Decision No. 925/88 was denied. [3 pages]

WCAT Decisions Considered: 925/88

DECISION NO. 719/90I (23/10/90) Onen Ferrari Barbeau

Adjournment (notice).

The worker was appealing a decision of the Hearings Officer denying benefits for thoracic outlet syndrome which the worker claimed was related to the nature of his work over a 20 year period. The Board had granted benefits for carpal tunnel syndrome. Entitlement for white finger disease was still being pursued at the Board.

There were a number of employers for whom the worker was employed for substantial periods who had not received notice of the appeal. The appeal was adjourned to give them notice.

The matter should not be brought back on for hearing until completion of the current stage of the process at the Board regarding entitlement for white finger disease. Any additional relevant materials produced by the Board in considering that matter should be added to the record of this appeal. [4 pages]

DECISION NO. 742/90I (23/10/90) Signoroni Drennan Barbeau

Adjournment (addition of representative).

The worker was appealing denial of a temporary supplement and vocational rehabilitation assistance after June 1988. The worker was recently informed that his pension was cancelled as of September 1990. The hearing was adjourned to allow the worker to obtain a representative and to consider appealing on related issues. [4 pages]

DECISION NO. 745/90 (23/10/90) McIntosh-Janis Lebert Nipshagen

Continuing entitlement.

The worker appealed a decision of the Hearings Officer denying entitlement for a shoulder condition subsequent to June 1979. The worker was a tree planter who suffered the injury in May 1979 when she fell off a wagon. The Board denied continuing entitlement, relying on the opinion of a Board doctor that the continuing condition was due to a preexisting condition and to subsequent non-compensable accidents.

The Panel could not place any weight on the Board doctor's opinion due to mistakes on important points concerning the worker's pre-accident and post-accident history. The Panel accepted the opinion of the worker's treating doctor and found that a previous shoulder injury had resolved prior to the compensable accident and that a preexisting cervical condition was not related to the shoulder condition. The worker was entitled to continuing benefits. The appeal was allowed. [7 pages]

DECISION NO. 748/90 (23/10/90) Strachan McCombie Preston

Suitable employment.

The worker suffered a back injury in July 1985. The worker appealed a decision of the Hearings Officer denying temporary benefits subsequent to September 1987 when the employer offered modified work installing mirrors and horns. The worker performed the job for one hour before laying off again.

In December 1987, the worker returned to work sanding vans on the paint line for about six months, then installed carpets in vehicles for three months. He also worked in the cushion room and the trim plant. A number of these jobs seemed more strenuous than the mirror and horn job. There was no significant change in the worker's condition during this period. The Panel concluded that the mirror and horn job was suitable modified work. The appeal was dismissed. [7 pages]

DECISION NO. 750/90 (23/10/90) Strachan McCombie Preston

Availability for employment (job search) - Board Directives and Guidelines (treatment control) (refusal of treatment).

The worker appealed a decision of the Hearings Officer granting only 50% benefits from October 1985 to July 1986. The worker suffered a herniated disc in an accident in November 1983. Surgery was recommended to alleviate back pain but the worker refused. The Board assessed a 20% pension based on a rating as though the surgery had taken place.

The worker was partially disabled during the period in question. From October 1985 to March 1986, he did not conduct a job search or cooperate with rehabilitation. In March 1986, he began to conduct a job search and found employment in July 1986. He started looking for work in March 1986 because his wife was laid off. Regardless of the reason, the worker did conduct a job search starting in March 1986 and in fact found suitable employment as a result.

The worker was entitled to full temporary partial disability benefits from March 1986 to July 1986. The worker's decision not to undergo surgery was not a factor in the Panel's conclusion. The appeal was allowed in part. [8 pages]

Board Directives and Guidelines: Claims Adjudication Branch Procedures Manual, Document no. 33-32-10

DECISION NO. 751/90 (23/10/90) McIntosh-Janis Lebert Nipshagen

Disablement (nature of work) - Initial entitlement.

The worker appealed decisions denying initial entitlement for lower back, upper back and neck disabilities, now diagnosed as fibrositis syndrome, which the worker related to either a compensable accident in November 1982 or the nature of his work from 1970 to 1972.

The worker was a hookman, preparing boxcars to be filled with grain. The worker claimed that his condition was related to his work when he had to manually move boxcars into position. The Panel found that the worker's condition was not related to the nature of his work. Manual positioning of the boxcars was done only on an occasional basis. Medical evidence did not relate his condition to his job duties.

The worker fell in November 1972. He received medical aid benefits only. Although he did not lose time from work, he did no work duties for about one week and did light work for about two months. Prior to the accident a myelogram was performed, showing no significant abnormalities in the cervical, dorsal or lumbar areas. Several months after the accident, a discogram indicated a disc herniation at L4-5. Surgery was performed in December 1973. The Panel found that accident led to the hospitalization and surgery for the low back condition. The appeal was allowed in part. [8 pages]

DECISION NO. 755/90 (23/10/90) Onen Rao Barbeau

Consequences of injury (altered gait) - Reflex sympathetic dystrophy - Hearing loss.

The worker suffered a left ankle injury in 1984 when he fell off a ladder. He was awarded a 35% pension for organic disability and a 10% pension for psychotraumatic disability. The worker appealed a decision of the Hearings Officer denying entitlement for a right foot disability and for hearing loss and denying temporary benefits subsequent to December 1987.

The worker suffered reflex sympathetic dystrophy in the left leg. The preponderance of medical evidence supported the existence of reflex sympathetic dystrophy in the right leg as well and that it was related to the compensable accident. The worker was entitled to benefits for the right foot condition.

The worker experienced hearing loss in the low tones beginning in 1980. The Panel accepted the preponderance of medical opinion that this type of hearing loss was not caused by noise exposure. In addition, the hearing loss was not related to the compensable accident, considering that the hearing loss began four years before the accident. The worker was not entitled to benefits for hearing loss.

The worker's condition was permanent and he had achieved maximal medical rehabilitation by December 1987. He was not entitled to further temporary benefits.

The appeal was allowed in part. [11 pages]

DECISION NO. 766/90 (23/10/90) Onen Robillard Chapman

Significant contribution (of compensable accident to disability) - Causation (medical evidence).

The worker suffered an eye injury in an explosion in 1959. As a result of soft tissue injuries, the worker was left with damage to the supraorbital nerve, causing numbness. The worker's executrix continued an appeal commenced by the worker from a decision of the Appeals Adjudicator denying entitlement for irritation, swelling and discharge in the right eye in the 1970s.

The Panel accepted that the worker experienced excessive discharge and irritation since the injury and the condition became worse by 1970. The worker was diagnosed as suffering from diabetes around 1977. Diabetes could enhance the symptoms of numbness and paraesthesia suffered by the worker.

Diabetes was a significant causative factor in the worker's eye condition, affecting the worker as it progressed. Diabetes was not the sole cause of the condition, considering the existence of eye symptoms long before the development of diabetes. Although diabetes may have enhanced the worker's condition, the accident was a significant contributing factor to the condition and the worker was entitled to benefits.

The Panel noted that a medical expert, particularly one retained by the Tribunal to provide an opinion as in this case, should not provide an opinion as to entitlement. There is a difference between legal and medical causation. An opinion as to entitlement could raise questions as to the weight to be attached to the report. In this case, the Panel was able to use the evidence in the report despite the legal conclusion.

The appeal was allowed. [7 pages]

DECISION NO. 793/90I (23/10/90) Onen Cook Chapman

Adjournment (additional evidence).

The worker was appealing a decision of the Hearings Officer denying full temporary benefits subsequent to November 1988. The worker suffered compensable injuries in 1985 and 1987. The Hearings Officer appeared to define the issue as relating to the 1987 accident. However, he in fact considered evidence and submissions respecting the 1985 and the 1987 accidents. The Case Description contained material relating to the 1987 accident only.

The Panel could not proceed without the material relating to the 1985 accident. Even on the narrow issue of benefits resulting from the 1987 accident, the Panel needed that material relating to the 1985 accident as a starting point in determining whether the worker returned to his pre-1987 accident state.

The hearing was recessed. Tribunal counsel was instructed to prepare a new Case Description. [6 pages]

DECISION NO. 267/90 (24/10/90) Carlan Beattie Preston

Rehabilitation, vocational (cooperation).

The worker suffered a neck and shoulder injury in 1983. The worker appealed a decision of the Hearings Officer granting only 50% benefits from February 1988 to October 1988.

In January 1988, the worker began a computer training programme sponsored by the Board. In February 1988, the worker stopped going to the programme because of headaches and pain. The worker claimed that he should be entitled to full benefits during the period in question since he was undergoing medical rehabilitation at home.

The Panel found that the symptoms described by the worker in February 1988 should not have prevented him from attending the course. Reports from specialists showed minimal findings. The Panel did not believe

that the worker was as disabled as he claimed. The decision to withdraw from the programme was unjustified. By withdrawing, he failed to cooperate and was disentitled from receiving full benefits. The appeal was dismissed. [6 pages]

DECISION NO. 406/90 (25/10/90) Kenny Higson Meslin

Accident (occurrence).

The worker appealed a decision denying entitlement for a back injury. The Panel found the worker to be a credible witness and accepted that he suffered a back injury when lifting a heavy part and that his condition got worse over the next few days until he laid off. The appeal was allowed. [6 pages]

DECISION NO. 417/90R (25/10/90) Starkman Drennan Meslin

Reconsideration.

The worker's request to reconsider Decision No. 417/90 was denied. In Decision No. 417/90, the Panel referred the case back to the Board to assess whether the worker's 1% pension for partial finger amputation was intended to encompass pain or whether it was intended to compensate for anatomical loss only. Although the amount of money involved was small, the issue regarding the Rating Schedule and how the Board applies it was important and the Board had not dealt with the issue directly. [4 pages]

DECISION NO. 530/90 (25/10/90) Hartman Jackson Meslin

Temporary disability (beyond pension level).

The worker appealed a decision of the Hearings Officer denying temporary total disability benefits from March 1988 to September 1988. The worker suffered a back injury in 1981 for which he was awarded a 40% pension retroactive to the period in issue. On the evidence, the worker was not disabled beyond his pension level. The appeal was dismissed. [5 pages]

DECISION NO. 777/90I (25/10/90) Kenny Jackson Preston

Procedure (absent parties).

The worker was appealing denial of a commutation of his pension. On the day prior to the hearing, the worker sent a fax to his representative stating that he would be unable to attend. The Panel granted an adjournment with the condition that, if the worker does not agree to a new hearing date within 30 days, the file will be closed. [3 pages]

DECISION NO. 849/89 (29/10/90) Starkman Robillard Jewell

Permanent disability (loss of body part) - Impairment of earning capacity (loss of stomach) - Pensions (AMA Guides) (upper respiratory tract) - Pensions (assessment) (stomach).

The worker suffered a low back injury for which he was awarded a 30% pension. As part of the treatment, the worker was prescribed the drug Feldene. The worker developed extensive gastrointestinal problems resulting in the removal of his stomach, sternum and several ribs. The Board paid for the surgery and convalescent period. The worker appealed a decision of the Hearings Officer denying a pension for the gastrointestinal problems.

The Board responded to inquiries of the Panel, stating that pensions are not granted for loss of body parts but, rather, for impairment of earning capacity. A pension might be granted for a gastrectomy if it caused a disturbance of the person's metabolism. When assessing such a pension the Board would look at texts such as the AMA Guides.

The worker continued to suffer from heartburn and pain in the ribs and had to eat a frequent number of smaller meals. The Panel was satisfied that the removal of the worker's stomach resulted in some restrictions in the worker's activities of daily living and a commensurate impairment of his earning capacity. The worker's condition fit best into Class 2 of the AMA Guides for impairment of the upper respiratory tract, being an anatomic loss requiring appropriate diet for control of symptoms. The worker was entitled to a 10% pension. The appeal was allowed. [8 pages]

DECISION NO. 937/89 (30/10/90) Onen McCombie Apsey

Disablement (strenuous work) - Delay (claim) - Credibility - Causation (medical evidence).

The worker appealed a decision of the Hearings Officer denying entitlement for a low back disability, which the worker claimed was related to the nature of her work in 1983. The worker did not claim benefits until the fall of 1985.

The worker worked as a skid trapper and head sheet packer for a paper manufacturer. The Panel found that this work required heavy lifting, bending and pushing. Medical evidence from the worker's doctors indicated that the worker's disc prolapse could have been caused by the work she was doing. The fact that the worker herself did not originally relate her condition to work was not determinative. The causation of this type of injury is a medical question. The preponderance of evidence indicated that employment was a significant cause of the worker's back condition. The appeal was allowed. [9 pages]

DECISION NO. 567/87 (31/10/90) Strachan Heard Merritt

Vibrations (tools) - White finger disease.

The worker appealed a decision of the Hearings Officer denying entitlement for white finger disease. For 19 months, he was exposed to vibrations while working on a nick and break pointer machine.

White finger disease can result from the use of vibratory tools or it can be classified as idiopathic, with no obvious cause. In this case, there was a temporal relationship between work exposure and the emergence of symptoms. There was indication that other workers suffered similar symptoms. Medical evidence indicated that idiopathic Raynaud's syndrome may emerge in a patient's late teens or early adulthood but may also start in the forties. The fact that in this case the worker was 53 served to reinforce the suggestion that the condition was work related.

The Panel concluded that the worker suffered from vibration induced white finger disease. The appeal was allowed. [13 pages]

Board Directives and Guidelines: Claims Services Division Manual, s.122(1), p.262, Directive 15

DECISION NO. 17/89 (31/10/90) Moore Klym Seguin

Apportionment - Negligence - Transfer of costs - Supplier of motor vehicle, machinery or equipment - Worker (seconded) - Discretion, Board (apportionment).

The accident employer appealed a decision of the Hearings Officer denying a transfer of the costs of an accident to another employer. A worker was injured when a piece of wood fell from the top of a crane. The wood was part of a platform built and left in place by the installer of the crane. It was used during erection and dismantling of the crane but not during operation of the crane. The piece of wood fell about six months after installation during a gust of wind. The crane was operated by employees of the accident employer.

Section 8(9) allows transfers of costs in cases of negligence. In Decision No. 17/89I2, the Panel determined that the commonly accepted principles of negligence law apply.

The Panel found that the platform became detached as a result of negligence and not as a result of an act of God. On the day of the accident, winds gusted up to 85 km/h. Winds of this strength are exceptional but foreseeable.

The negligence occurred principally at the time of installation. The installer had a haphazard procedure, constructing the platform from materials found at the work site. The Panel also noted that after the accident, the installer adopted a new procedure of welding the platform to the crane. The Panel found that the workers of the installer were negligent in the manner in which they attached the platform to the crane.

There was contributory negligence on the part of the crane operator. The operator was required by law to inspect the crane daily. Although the operator did inspect the crane, he did not inspect the platform since it did not form part of the crane itself. Careful inspection of the platform may well have revealed partial detachment of the wires holding the platform in place.

There was no negligence on the part of the supplier of the crane. In any event, it supplied equipment without supplying an operator and, consequently, would be exempt from the provisions of s.8(9) by virtue of s.8(10), which applied to transfers of costs as well as protection from lawsuit.

Although the supplier did not provide an operator, it did provide a worker who was involved in the installation of the crane. A worker of the supplier had been seconded to the installer for the purpose of supervising the installation. Section 2a provides that the original employer is deemed to continue to be the employer while the worker is working for the other person. The Panel found that this section is designed to facilitate administrative decisions but is not designed to shift responsibility for negligence from the temporary employer to the permanent employer. Presumably, the act of negligence would be undertaken at the direction of the temporary employer.

Section 8(9) gives the Board discretion to transfer costs. Transfer of costs may be dependent on factors beyond simple assignment of negligence. The Panel apportioned the negligence at 75% to the installer and 25% to the accident employer, with no negligence on the part of the supplier. The Panel left it to the Board to consider the apportionment of costs, taking into account the Panel's findings regarding negligence. [12 pages]

WCAT Decisions Considered: Decision No. 17/89I2 (1990), 13 W.C.A.T.R. 118; Decision No. 688/89 (1990), 14 W.C.A.T.R. 156

DECISION NO. 264/89 (31/10/90) Strachan Heard Jago*Accident (occurrence) - Credibility.*

The worker appealed a decision of the Hearings Officer denying entitlement for a low back condition. The worker claimed that the condition resulted from two accidents in April 1985.

The worker's demeanour, recollection of events, explanations for discrepancies and periodic evasiveness led the Panel to prefer the testimony of the worker's foreman. The foreman testified in a clear and straightforward manner. His demeanour, recollection of detail and consistent answers impressed the Panel. On the basis of the foreman's evidence, and supported by the evidence of a co-worker, the Panel found that any discomfort experienced by the worker was not related to work. The appeal was dismissed. [9 pages]

DECISION NO. 495/90 (31/10/90) Starkman McCombie Jago*Maximal medical rehabilitation - Pensions (assessment) (whole person concept).*

The worker suffered a back injury in 1978 for which he was awarded a 10% pension in 1980. In July 1989, the pension was increased in 15% retroactive to May 1988. The worker appealed denial of temporary benefits from May 1987 to July 1989 and the level of his pension.

The pension was increased because of a slight organic deterioration from the date of the previous assessment. A slight deterioration over time is to be expected and is not out of the ordinary. The Panel found that the worker had reached maximal medical rehabilitation by May 1987 and was not entitled to temporary benefits.

The worker was suffering from moderate to severe pain, which was mostly due to the organic back problems. Comparing the worker's condition to the benchmarks in the Rating Schedule, and using a whole person approach, the Panel found that the worker's 15% pension accurately reflected his impairment of earning capacity. [8 pages]

WCAT Decisions Considered: Decision No. 915 (1987), 7 W.C.A.T.R. 1

DECISION NO. 747/90 (31/10/90) Signoroni Beattie Chapman*Penalties.*

The employer appealed a decision of the Hearings Officer confirming a penalty assessment for the years 1981-83. There employer's safety record did not begin to improve until 1989. There was no reason to cancel or alter the assessment. The appeal was dismissed. [5 pages]

Regulations Considered: Reg. 951 s. 6(1)

DECISION NO. 758/90 (31/10/90) Signoroni Beattie Howes*Supplements, temporary - Rehabilitation, vocational (cooperation).*

The worker appealed a decision of the Hearings officer denying a temporary supplement subsequent to October 1988. The worker suffered a knee injury in 1984 for which he was awarded a 10% pension. In the

period prior to October 1988, the worker attempted several modified jobs. However, the worker's apparent willingness to try these jobs made available by the Board could not be accepted as genuine. Considering medical evidence regarding his medical restrictions, the Panel found that the worker was capable of performing the modified jobs. The Board correctly exercised its discretion to discontinue the supplement. [8 pages]

DECISION NO. 781/90 (31/10/90) Onen Klym Nipshagen

Psychotraumatic disability - Chronic pain - Pensions (assessment) (psychiatric disability).

The worker suffered a low back injury in 1976, for which he was awarded a 10% pension for organic disability, later increased to 15%. He was also awarded a 15% pension for psychiatric disability from May 1982 to November 1985. The worker appealed denial of a continuing pension for psychiatric disability.

The preponderance of medical evidence supported the worker's claim that he continued to suffer from psychiatric disability, diagnosed as a form of conversion disorder or post-traumatic neurosis. Even if there was a chronic pain element to the worker's condition, the primary non-organic disabling factor was the psychiatric condition, which also caused the worker to experience pain.

The worker's condition came within Category 2 of the Board's guidelines for psychiatric impairment. The worker was entitled to a 20% pension subsequent to November 1985. [8 pages]

Board Directives and Guidelines: Claims Services Division Manual, s.71(3), p.209, Directive 23

DECISION NO. 834/90 (31/10/90) McIntosh-Janis Higson Chapman

Withdrawal (of appeal).

The worker was appealing a decision denying temporary total disability benefits subsequent to December 1986. At the hearing, the worker stated that he wanted also to argue entitlement to benefits for temporary partial disability and to a temporary supplement.

The issue of entitlement to a supplement involved determination of issues, such as impairment of earning capacity, that the Panel was not prepared consider. The worker did not want to proceed without consideration of the supplement issue. The appeal was considered withdrawn without prejudice to bring the matter back again. [3 pages]

DECISION NO. 936/89 (01/11/90) Faubert Fox Nipshagen

Continuing entitlement - Disability (disabled from working).

A truck driver suffered a low back injury in January 1986. He appealed a decision of the Hearings Officer denying entitlement beyond October 1986, when Board doctors determined that he was fit to return to regular work. One of the worker's doctors said the worker should look for work with no bending or lifting. He stated that there would likely be a recurrence of back pain if the worker were to return to regular work.

While there is a risk of recurrence for every person who has suffered an acute episode of back pain, that risk was not sufficient to discourage the worker from returning to regular work where the physical examination disclosed no evidence of impairment. The appeal was dismissed. [10 pages]

WCAT Decisions Considered: Decision No. 559/87, (1988), 9 W.C.A.T.R. 103

DECISION NO. 955/89 (01/11/90) Kenny Klym Seguin

Aggravation (preexisting condition) (Legg-Perthes' disease) - Delay (onset of symptoms) - Benefit of the doubt - Natural justice (oral hearing) - Medical report (early reports preferred).

The worker suffered a severe bruise of the sacrum and coccydynia when he fell down an embankment in 1976. The Board denied benefits for a right hip disability. The Standing Committee on the Ombudsman recommended entitlement be granted for the hip condition on the basis of aggravation of Legg-Perthes' disease. The employer appealed a decision of the WCB Ombudsman Administrator to accept the recommendation and grant benefits.

The difference in medical opinion regarding a relationship between the accident and the hip condition depended on whether the doctors accepted the worker's evidence of hip problems since the time of the accident. Therefore, the real issue was factual and largely a question of credibility.

There was an absence of recorded medical complaint until four years after the accident. However, there was some evidence of limping in early medical reports. There was a close proximity between the sacrum and coccyx and the area affected by Legg-Perthes' disease. Also, it appeared that the worker's hip was not actually examined by the doctor he was seeing from 1976 to 1980. This somewhat reduced the extent to which the Panel relied on the absence of abnormal hip findings during this period.

The Panel concluded that the evidence was approximately equal in weight. The Panel applied the benefit of doubt in favour of the worker. The appeal was dismissed.

It was noted that the decision of the WCB Ombudsman Administrator was made without an oral hearing. Although concerned about the process, the Panel was satisfied that there was a final decision of the Board and that the appeal was properly before the Tribunal. [11 pages]

**DECISION NO. 100/90 (01/11/90) Chapnik McCombie Preston
Bettencourt v. Dinis; Jevco Insurance Co., Third Party**

Section 15 application - Jurisdiction, Tribunal (section 15) (initial entitlement) - In the course of employment (parking lots) - In the course of employment (reasonably incidental activity test).

The third party applied to determine whether the plaintiff's right of action was taken away. The plaintiff was walking from his car in the employer's parking lot to the plant. The defendant was a passenger on a motorcycle. As the defendant removed his helmet, he struck the plaintiff in the face. The plaintiff, the driver of the motorcycle and the passenger were all workers of the employer. The defendant arrived at work early for a meeting scheduled at the administration offices to discuss some training.

The Board's Claims Adjudication Branch found that the plaintiff was not in the course of employment. The plaintiff asked the Tribunal to determine the right to compensation benefits. The Panel found that it had jurisdiction under s.15 to determine the right to compensation notwithstanding that the plaintiff had not exhausted the process at the Board.

It was agreed that the driver of the motorcycle was in the course of employment. The Panel found that the defendant was also in the course of employment. Although he was not proceeding to the plant to carry out his duties, he was engaged in an activity with an employment focus. His activity relating to the meeting was reasonably incidental to employment.

The plaintiff was in the course of employment. There was no evidence to rebut the presumption that the accident arose out of employment. The plaintiff's right of action was taken away. He was entitled to receive compensation benefits. [14 pages]

WCAT Decisions Considered: Decision No. 86 (1986), 2 W.C.A.T.R. 52; Decision No. 150 (1986), 1 W.C.A.T.R. 201; Decision No. 547/87 (1988), 8 W.C.A.T.R. 160; Decision Nos. 190/88, 462/88, 993/88, 558/89
Board Directives and Guidelines: Claims Services Division Manual, s.3(1), p.47, Directive 21; Operational Policy Manual, Documents nos. 03-02-02, 03-02-03, 03-02-06

DECISION NO. 552/90 (01/11/90) Bigras Robillard Apsey

Permanent disability - Pensions (arrears).

The worker suffered a back injury in 1977. He suffered a further back injury in June 1986, requiring surgery in 1987, for which he was awarded a 15% pension retroactive to the date of the accident in 1986. The worker appealed a decision of the Hearings Officer denying a pension from the date of the accident in 1977.

On the evidence, the worker suffered continuing, intermittent pain subsequent to the 1977 accident. However, he was able to continue with physically demanding work. The Panel found that the worker's condition was not permanent until the 1986 accident. The appeal was dismissed. [6 pages]

WCAT Decisions Considered: 654/87

Board Directives and Guidelines: Claims Adjudication Branch Procedures Manual, Document no. 33-20-01

DECISION NO. 784/90 (01/11/90) Sandomirsky McCombie Chapman

Supplements, temporary - Rehabilitation, medical (cooperation) - Psychotraumatic disability.

The worker fractured his wrist in a compensable accident in 1982. In December 1983, he was awarded an 8% pension, increased to 12.5% in December 1988. In December 1987, he was awarded a 15% pension for non-organic disability retroactive to January 1987. The worker appealed denial of a supplement subsequent to November 1986. He also appealed denial of benefits for a shoulder and neck disability and for high blood pressure as well as denial of temporary benefits subsequent to November 1986.

The worker received a supplement prior to November 1986. However, as time passed, he became increasingly preoccupied with his disability and less motivated to return to work. The Rehabilitation Counsellor recommended no further vocational rehabilitation until after a psychiatric assessment. The worker attended these assessments and was awarded the 15% pension. The worker cooperated with medical rehabilitation. He was entitled to the supplement until December 1987, when the pension was granted and it was determined that no further programme could be pursued.

On the evidence, the neck and shoulder disability resulted from his psychological condition, for which he was awarded a pension, and was not an organic disability. The worker was not entitled to benefits for the neck and shoulder disability.

The worker refused to undergo surgery for a wrist fusion. The 12.5% pension was the equivalent of the rating for a fusion. The 12.5% award reflected the level of the worker's organic wrist disability.

The worker was not entitled to temporary benefits subsequent to November 1986 since he had reached maximal medical rehabilitation. Evidence did not support entitlement for high blood pressure. The appeal was allowed in part. [8 pages]

DECISION NO. 116/90 (02/11/90) Faubert Lebert Jago

Heart attack - Board Directives and Guidelines (cardiac conditions) (unusual physical exertion).

The worker appealed a decision of the Hearings Officer denying entitlement for a heart attack. The worker was a meat department manager at a grocery store. He had a severe episode of chest pain at home on a Tuesday morning. The worker testified that he was short-staffed the previous Saturday. He experienced a slight pain in his shoulders and neck that day but the pain went away after he relaxed for a few minutes. The worker performed his usual work on Monday.

The incident of pain on Saturday may have been a symptom of the worker's heart disease. However, it could not be said that the myocardial infarction occurred in the course of employment. It occurred at home on the Tuesday. Therefore, the presumption clause in s.3(3) was not applicable.

Tribunal panels have found that unusually hard work over a period of time can constitute unusual physical exertion within the Board guidelines. However, those decisions concerned heart attacks that occurred at work. Medical evidence indicated that employment can contribute to the onset of a heart attack where there is exertion which creates an increased oxygen demand which cannot be met, in large part because of the underlying condition. In such cases, the symptoms of infarction should appear at the time of the exertion or soon thereafter. That was not the situation in this case.

The Panel found that work did not contribute significantly to the worker's heart attack. In any event, the work performed in this case did not constitute unusual physical exertion. The worker worked overtime about ten hours per week. Most of the time was spent cutting meat or in management functions. Neither the overtime nor the work on the Saturday constituted unusual exertion or stress. The appeal was dismissed. [9 pages]

WCAT Decisions Considered: Decision No. 24F (1990), 13 W.C.A.T.R. 1; Decision No. 42/89 (1989), 12 W.C.A.T.R. 85;

Decision No. 224/90 (1990), 14 W.C.A.T.R. 310; Decision Nos. 244, 575/87, 514/88

Board Directives and Guidelines: Claims Services Division Manual, s.1(1)(a), p.1, Directive 6

DECISION NO. 595/87R (05/11/90) Kenny Cook Jago

Availability for employment (reassessment of negative decision) (onus of proof) - Availability for employment (reassessment of negative decision) (standard of proof) - Rehabilitation (reassessment of negative decision) (onus of proof) - Rehabilitation (reassessment of negative decision) (standard of proof) - Reconsideration (error of law).

The Panel reconsidered Decision No. 595/87. In 1984, the Appeal Board determined that the worker was partially, rather than totally, disabled from May 1982 to June 1982 and that the worker refused suitable work with no wage loss in May 1982. However, it found that the worker was totally disabled from June 1982 to July 1982. The Appeal Board found that the worker was disentitled to all temporary partial benefits subsequent to May 1982. In Decision No. 595/87L, the Tribunal granted leave to appeal with respect to the finding that the worker was disentitled to all benefits subsequent to May 1982. In Decision No. 595/87, the Hearing Panel stated that when a worker seeks reassessment of a negative decision regarding cooperation or availability, the onus is on the worker to bring forward clear and convincing evidence of a distinct change in approach.

The Tribunal cannot create onus requirements or tests that are not in accordance with the Act. The test applied by the Hearing Panel was not appropriate to the facts of this case. At the time the worker was offered the suitable work in May 1982, it was the opinion of the Board that she was totally disabled. It was not until two years later that the Appeal Board determined that she was only partially disabled at that time.

When the worker was terminated by the employer in June 1982, she started looking for work and the

Board opened a vocational rehabilitation file for her. This was at a time when she was found by the Appeal Board to be totally disabled. Vocational rehabilitation assistance was provided until the Appeal Board decision in 1984.

A test which retroactively requires a person to do more than was required by the Vocational Rehabilitation Division is not appropriate. The Panel must consider and weigh all the evidence and facts to determine whether the worker met the cooperation and availability requirements.

In July 1982, the worker was only partially disabled. She had been terminated in June when totally disabled. Her previous total disability and the decision of the Board to provide rehabilitation services were important factors in the Panel's decision to end the disqualification from receiving benefits. She was entitled to full benefits until June 1984. During certain periods she appeared to become discouraged and did not look for work as actively as others. However, she always increased her efforts at the suggestion of her Rehabilitation Counsellor. [13 pages]

WCAT Decisions Considered: Decision No. 595/87RI (1989), 12 W.C.A.T.R. 1; Decision Nos. 595/87L, 595/87

DECISION NO. 1268/87 (05/11/90) Carlan Heard Nipshagen

Exposure (beta-naphthylamine) - Cancer (bladder).

The worker sought entitlement to benefits for bladder cancer diagnosed in 1980. For two years, during 1948 to 1950, he worked for a large rubber manufacturer. During that period, the worker came into contact with Agerite White, an anti-oxidant that contained beta-naphthylamine (BNA).

There was no good epidemiological evidence to establish a relationship between work at the employer's plant and death from bladder cancer. However, as death was not the usual result of bladder cancer (it has a mortality rate of between 40% and 60%), statistics dealing with deaths attributable to bladder cancer, rather than the incidence of bladder cancer, were inconclusive. The literature and the medical community accepted that BNA was a potent human carcinogen resulting in bladder cancer. Leading authorities, and Ontario occupational health and safety regulations, stated that there should be no exposure to BNA.

The worker was exposed for two years to a potent carcinogen, both by inhalation and by skin contact. Other known causes of bladder cancer were inapplicable to the worker. His disability became apparent about 30 years after the exposure, which was within the realm of reasonable latency periods. The worker was entitled to benefits for any disability arising out of treatment for bladder cancer. [12 pages]

WCAT Decisions Considered: Decision No. 1268/87L

Appendices: Bibliography of articles on bladder cancer, particularly with respect to rubber industry workers.

DECISION NO. 390/90 (05/11/90) Ellis Lebert Jago

Continuity (of treatment).

The worker appealed a decision of the Hearings Officer denying ongoing entitlement to benefits for a right hip and knee condition which the worker claimed was related to a compensable knee injury in March 1985.

There was a lack of continuity of complaint and treatment. However, medical reports did support the probable connection between the present disability and the knee injury. In addition, the worker had a stoic personality and was a very reliable worker. There was evidence indicating a predisposition in both hip joints to degenerative changes but the disabling condition had developed only in the right hip at the present time.

The Panel found that the evidence on the issue of work relatedness was at least equal in weight. The appeal was allowed. [7 pages]

DECISION NO. 443/90 (05/11/90) Bigras McCombie Meslin

Penalties - Board Directives and Guidelines (penalty assessments) (charitable organization) - Board Directives and Guidelines (penalty assessments) (homogeneous rate group).

The employer appealed a decision of the Hearings Officer confirming a penalty assessment for the years 1983-85. The employer was a county-owned home for senior citizens. It submitted that the assessment should be eliminated on the grounds that: 1) it had expended considerable effort to reduce accident rates by instituting safety programs; 2) it had higher risks than other institutions in the rate group; 3) it was a charitable organization.

1) The employer had instituted safety programs between 1987 and 1989. However, its accident frequency and costs had continued to climb for the two years after 1983-85 period.

2) The Panel was not convinced that the employer's high accident record was in any significant way attributable to the increased risk of dispensing long term and psychiatric care. Rather, it was the employer's lack of concern (bordering on disregard) for workers' health and safety programs that significantly enhanced its high accident cost record.

3) The Panel could not accept the principle that the source of funding ought not to be the determining factor on the issue of excluding non-profit organizations from penalty assessments. Neither could it accept that the most important factor was the organization's registration as a charitable organization under the Income Tax Act. The day to day operation of publicly owned homes did not depend on charitable donations. The bulk of operating funds was derived from public funding with an additional amount coming from fees. In denying the exemption for charitable organizations, the Panel stated that the significant fact was that the penalty imposed had no relationship with the charitable donations received by the employer. Regarding Income Tax Act status, the Revenue Canada test for registration appeared to be based not on charitable criteria but, rather, on public service criteria. Therefore, registration under the Income Tax Act did not establish status as a charitable organization.

The Panel also noted that eliminating the assessment from this publicly-funded home would shift the burden to other privately-operated homes which do rely on charitable donations.

The appeal was dismissed.

In an Addendum, the Worker Member noted that workers or unions are not given notice of employer assessment cases but that they may have relevant evidence in some situations.

In an Addendum, the Employer Member noted the problem that the cost of a penalty assessment would likely be added to a publicly-funded employer's budget and, therefore, be paid out of public funds. [14 pages]

WCAT Decisions Considered: Decision No. 255/87 (1987), 5 W.C.A.T.R. 147; Decision No. 94/89 (1989), 11 W.C.A.T.R. 260; Decision No. 39/90 (1990), 13 W.C.A.T.R. 333; Decision No. 829/88

Regulations Considered: Reg. 951, s.6

Board Directives and Guidelines: Additional Assessments Policies and Procedures, Board Minute 6, January 14, 1975, p.4419; Section 91(7) Consultation Report and Policy Recommendations, Board Minute 8, March 2, 1990, p. 5358

DECISION NO. 490/90 (05/11/90) Bigras Higson Nipshagen

Dermatitis - Aggravation (preexisting condition) (dermatitis) - Continuing entitlement - Psychotraumatic disability.

The worker appealed a decision of the Hearings Officer denying continuing entitlement for dermatitis and denying entitlement for a psychological condition. The worker was a cook's assistant. In 1985, she laid off due to severe dermatitis. She received benefits until April 1988. She also suffered from significant levels of depression and anxiety.

On the evidence, exposure to a powerful dishwashing detergent aggravated preexisting asymptomatic atopic dermatitis or dyshidrotic eczema. The organic symptoms did not disappear after removal from exposure. It was not shown that any other factors caused the continuation of the condition after April 1988. Successful treatment commenced in June 1988 and her condition stabilized by October 1988. The worker was entitled to full benefits until October 1988 and to a pension thereafter.

The worker's skin condition was a significant factor in the development of her psychological condition. However, there were a number of other non-compensable factors that aggravated the psychological condition. The Panel did not have sufficient information to determine whether the psychological condition was disabling and whether the sequelae of the accident continued to be a significant contributing factor. The Panel referred this matter back to the Board. [18 pages]

WCAT Decisions Considered: Decision No. 915 (1987), 7 W.C.A.T.R. 1

Board Directives and Guidelines: Claims Services Division Manual, s.71(3), p.207, Directive 22

DECISION NO. 567/90 (05/11/90) Chapnik Lebert Jago

Medical examination (section 21) - Procedure (section 21) (access to worker file).

The worker applied for an order that she was not required to attend a medical examination requested by the employer. The employer had not applied for access to the worker's file. The employer had not shown that the examination was important to achieving its valid compensation goal. The worker was not required to attend the examination. [6 pages]

WCAT Decisions Considered: Decision No. 174 (1986), 2 W.C.A.T.R. 96; Decision No. 185 (1986), 3 W.C.A.T.R.110;

Decision No. 696/88 (1989), 10 W.C.A.T.R. 308

Cases Considered: Canada Post Corp. v. C.U.P.W. (1989), 70 O.R. (2d) 394

DECISION NO. 652/90 (05/11/90) Bigras McCombie Jago

Charlton v. Ducharme

Section 15 application - In the course of employment (travelling).

The defendants in a civil case applied to determine whether the plaintiffs' right of action was taken away. The issue was whether the defendants were in the course of employment at the time of a motor vehicle accident. The defendants were employed as pipefitters by their employer to work at a plant belonging to a different company. They were proceeding from their homes to their trailer, which was their temporary residence during the week, near the work site. They planned to deliver clothing and groceries at the trailer before heading to the plant.

The defendants' travel was not part of their work. They were employed as pipefitters specifically to work at that plant and no other site was involved. They were not undertaking any duty to the employer. They were travelling in their own car on their own time and they received no travel allowance.

The defendants were not in the course of employment. The plaintiffs' right of action was not taken away. [9 pages]

WCAT Decisions Considered: Decision No. 44 (1986), 2 W.C.A.T.R. 8; Decision No. 123 (1986), 2 W.C.A.T.R. 66; Decision No. 215 (1987), 4 W.C.A.T.R. 105; Decision No. 372 (1987), 4 W.C.A.T.R. 154; Decision No. 420 (1986), 3 W.C.A.T.R. 168; Decision Nos. 326, 414, 455

Board Directives and Guidelines: Claims Adjudication Branch Procedures Manual, Document nos. 33-14-01, 33-14-03; Claims Services Division Manual, s.391, p.50, Directive 22

Cases Considered: Decision No. 2 (1973), 1 B.C.W.C.R. 7; Marks' Dependents v. Gray, 251 N.Y. 90, 167 N.E. 181 (1920); Nancollas v. Insurance Officer, [1985] 1 All E.R. 833

**DECISION NO. 729/90I (05/11/90) Onen McCombie Sutherland
Slaytor v. Emonts**

Section 15 application - Worker (test) - Independent operator - Delay (section 15 application) - Merits and justice (interpretation).

The employer carried on the business of providing bird and animal control services to airports. The claimant began performing such services at the Toronto International Airport in August 1982 and was injured in September 1982. The employer contended that the claimant was hired as an independent contractor rather than as a worker.

The Panel found that the claimant was a worker. From August to September 1982, the claimant worked only with the employer. He provided the essential service for which the employer had contracted with the airport, that of bird and animal control. This service and this contract constituted a substantial part of the employer's business. The claimant was an integral and essential part of the organization of the business. The claimant provided this service in the name of the employer and did not have his own business for this service. The worker did not risk loss nor did he have any real chance to maximize profit.

The claimant argued that the employer's seven year delay in bringing this s. 15 application, from the time of the issuing of the writ, entitled him to relief under s. 80(1). However, s. 80(1) does not provide the type of general jurisdiction which would allow the Panel to depart from its findings of fact to then make a general conclusion based upon a general principle of fairness. Section 80(1) is a general framework for the fair application of the Act, rather than permission not to apply the Act in certain cases.

The question of whether the employer was an industry which fell within Schedule 1 was not determined by the Panel as the preliminary opinion of the Board was first required. [15 pages]

WCAT Decisions Considered: Decision No. 226/89 (1989), 11 W.C.A.T.R. 307

Cases Considered: Montreal (City) v. Montreal Locomotive Works Ltd. [1947] 1 D.L.R. 161 (P.C.); Stevenson, Jordan and Harrison Ltd. v. Macdonald and Evans Ltd. [1952] 1 T.L.R. 101

DECISION NO. 771/90 (05/11/90) Robeson Rao Apsey

Access to worker file, s. 77.

Access to the worker's file was granted to the employer. The Panel noted the new Board policy regarding disclosure of medical information. [4 pages]

DECISION NO. 773/90 (05/11/90) Stewart Robillard Chapman

Access to worker file, s. 77.

Access to the worker's file was granted to the employer. [3 pages]

DECISION NO. 775/90 (05/11/90) Stewart Robillard Chapman

Access to worker file, s. 77.

The employer appealed a decision of the Board to deny access to two memos in the worker's file. The issues in dispute were SIEF and continuing entitlement. The two memos dealt with financial matters that were not relevant to the issues in dispute. The appeal was dismissed. [3 pages]

DECISION NO. 776/90 (05/11/90) Stewart Robillard Chapman

Access to worker file, s. 77.

Access to the worker's file was granted to the employer. [3 pages]

DECISION NO. 293/90 (06/11/90) Starkman Robillard Jago

Chronic pain (marked life disruption).

The worker appealed a decision of the Hearings Officer denying a pension for chronic pain. The worker suffered a compensable shoulder injury in 1981.

The majority of medical reports supported the conclusion that the worker was suffering from chronic pain. An interpretation bulletin from the Policy and Program Development Department of the Board expanded on the interpretation of "marked life disruption" in the Board's chronic pain disorder policy. According to the bulletin, marked life disruption did not mean that it had to be serious or grave but, rather, that it was clearly noticeable or evident. In this case, after her return to work in 1983, the worker was unable to do any significant household chores, was unable to drive or carry on any significant outdoor activities.

The Panel found that the compensable accident was a significant contributing factor to the worker's chronic pain and that the worker experienced a marked life disruption as a result of the chronic pain. The worker was entitled to a pension. The appeal was allowed. [8 pages]

Board Directives and Guidelines: Interpretation Bulletin Re Interim Chronic Pain Disorder Policy - "Marked Life Disruption", Policy and Program Development Department, November 1988

DECISION NO. 565/90 (06/11/90) Bigras Robillard Jago

Second accident.

The worker appealed a decision of the Hearings Officer denying entitlement for a knee condition subsequent to April 8, 1988. The worker suffered a compensable knee injury in January 1988. This injury was

an aggravation of a preexisting non-compensable knee condition. On March 16, 1988, an orthopaedist cleared the worker to return to work on April 8, with no further appointments necessary. On March 21, 1988, the worker injured his knees in a non-compensable motor vehicle accident.

On the evidence, the worker's knee had returned to its pre-accident state by March 16, when he was examined by the orthopaedist. There was no significance to the doctor's normal cautionary three week delay in authorizing the return to work, except in the context of awarding the three weeks of benefits to April 8. Therefore, the worker's disability after April 8 was not compensable. The appeal was dismissed. [9 pages]

Board Directives and Guidelines: Operational Policy Manual, Document no. 03-04-04

DECISION NO. 604/90 (06/11/90) Bigras Rao Nipshagen

Disablement (repetitive work).

The worker appealed a decision of the Hearings Officer denying entitlement for a right shoulder condition, diagnosed as calcific rotator cuff tendonitis. The worker was a pasta maker. In the weeks prior to her lay-off, the worker had been working long hours. On the evidence, the shoulder condition was compatible with the nature of her employment. The Panel found that the condition was a disablement from the repetitive nature of her work. The appeal was allowed. [7 pages]

DECISION NO. 647/90 (06/11/90) Stewart Higson Nipshagen

Accident (occurrence).

The worker appealed a decision of the Hearings Officer denying entitlement for a back disability. The worker claimed that she felt a sudden pain in her back when lifting an assembled window onto a skid. She did not lay off until close to two months later. When she laid off, she did not state that she had back problems and she did not claim workers' compensation benefits immediately. The Panel was prepared to accept that the worker suffered some back discomfort from the incident. However, it was not established that her lay-off was related to the incident. The appeal was dismissed. [6 pages]

DECISION NO. 774/90 (06/11/90) Stewart Robillard Chapman

Access to worker file, s. 77.

The employer appealed a decision of the Board not to release certain documents to the employer. The issue in dispute was SIEF. The employer claimed that psychological factors prolonged the worker's condition. The documents related generally to the worker's psychological condition and were relevant to the issue in dispute. The appeal was allowed. [3 pages]

DECISION NO. 818/90 (06/11/90) Starkman Klym Preston
Jackman v. Bedford Towing Service Ltd.

Section 15 application - In the course of employment (proceeding to and from work).

The plaintiff in a civil case applied to determine whether his right of action was taken away. The issue was whether the plaintiff was in the course of employment at the time of a motor vehicle accident.

The plaintiff was a supervisor for a courier. On his way home, he stopped to view a situation in which a truck delivering material for the courier had slipped off the road onto the soft shoulder. While attending at this site, he was struck by a tow truck. The Panel found that the plaintiff was in the course of employment. His right of action was taken away. [8 pages]

Cases Considered: *Nancollas v. Insurance Officer*, [1985] 1 All E.R. 833

DECISION NO. 565/89 (07/11/90) Moore Klym Seguin

Pensions (assessment) (shoulder) - Pensions (assessment) (enhancement factor) - Pensions (assessment) (whole person concept) - Pensions (arrear).

The worker suffered an arm injury, for which he was awarded a 1% pension in 1980, raised to 5% in 1984 and to 10% in 1985. The worker appealed the level of the pension.

The pension was granted originally for an elbow disability. By 1985, the worker had also developed a shoulder disability. There was no change in the elbow disability from 1984 to 1985. The Panel confirmed the pension for the elbow disability at 5%. The increase in the pension in 1985 reflected the shoulder disability.

In 1990, the worker was found to have 70% loss of shoulder movement. Comparing this to the Rating Schedule of 35% for frozen shoulder, the Panel found that the worker's impairment in his shoulder was 25% (70% of 35%).

In Decision No. 831/88, the Panel was of the view that the Board policy on multiple factors should be expanded to apply to all parts of the body. This should be viewed as an elaboration of the whole-person approach recommended in Decision Nos. 915 and 915A.

Given the availability of the whole-person approach, the Panel felt it was not necessary to consider a specific enhancement factor. In this case, the 70% functional loss in the right shoulder was based on the shoulder alone. Taking the shoulder disability and the elbow disability together, there was a full functional loss of use of the right upper extremity. The combined effect of the two disabilities is the same as the 35% in the Rating Schedule for a totally frozen shoulder. The Panel had already granted awards totalling 30% (25% for the shoulder and 5% for the elbow). Therefore, the worker was entitled to an additional 5% to bring the total award to 35%.

Regarding retroactivity of the award, the 5% award for the shoulder was correct in 1985. However, the condition deteriorated quickly. By 1986, the worker was entitled to a 15% award for the shoulder disability (and the 5% award for the elbow). Effective 1988, the two awards should be replaced by the 35% pension.

The appeal was allowed. [10 pages]

WCAT Decisions considered: Decision No. 915 (1987), 7 W.C.A.T.R. 1; Decision No. 915A (1988), 7 W.C.A.T.R.269; Decision No. 831/88 (1989), 10 W.C.A.T.R. 334

Board Directives and Guidelines: Claims Services Division Manual, Ontario Rating Schedule, p. 143

DECISION NO. 492/90 (07/11/90) Starkman Lebert Clarke*Continuing entitlement - Psychotraumatic disability.*

The worker suffered a low back injury in September 1983. The worker appealed denial of benefits for organic disability subsequent to June 1984. The employer appealed the award of a 15% pension for psychotraumatic disability.

There was very little evidence of continuing organic pathology contributing to the worker's condition. The worker's appeal was dismissed.

Some doctors were of the view that the worker did not have a psychotraumatic disability. Other doctors concluded that the worker was depressed and that the depression was related to her perceived treatment by the workers' compensation system. The Panel was satisfied that the worker had a moderate psychotraumatic disability which was related to the accident. The employer's appeal was dismissed. [9 pages]

DECISION NO. 698/90 (07/11/90) Sandomirsky Drennan Apsey*Permanent disability.*

The worker suffered a back injury in 1971, for which he was awarded a 30% pension in 1976. He suffered a neck injury in 1979, for which he was awarded a 30% pension in March 1984. The worker appealed a decision of the Appeals Adjudicator denying temporary total benefits from December 1983 to March 1984.

On the evidence, the Panel found that the worker had reached a plateau in his recovery and had a significant permanent partial disability. The appeal was dismissed. [5 pages]

DECISION NO. 285/90 (08/11/90) Starkman Klym Clarke*Pensions (Rating Schedule) - Pensions (assessment) (back).*

The worker suffered a back injury in 1957. In 1988, he was awarded a 20% pension, retroactive to 1964, when he had surgery for a fusion from L4 to S1. The worker claimed that he should be awarded a 30% pension in accordance with the Rating Schedule for total immobility of the lumbar or lumbosacral spine.

The Panel found that the worker did not have total immobility of the lumbar or lumbosacral spine. That would involve fusion of L1 through L5 or L1 through S1.

More importantly, the ratings in the Rating Schedule are intended as guidelines. There are workers who have successful fusions who are able to continue their work and daily activities without pain. There are other workers who are unsuited for surgery or who have surgery but continue to have pain which restricts work and other activities. The nature and extent of restriction of movement, degree of pain and other factors are essential components in establishing a pension rating. This is particularly so with the back, neck and other areas where it is not possible to judge the extent of the disability with precision. A certain flexibility must be maintained in the process.

The Panel was satisfied that the 20% pension accurately reflected the worker's impairment of earning capacity. [6 pages]

DECISION NO. 507/90 (08/11/90) Lax McCombie Apsey*Suitable employment.*

The worker was a sales representative for an oil company. He suffered a back injury in September 1986. The worker appealed a decision of the Hearings Officer granting only 50% benefits from May 1987 to October 1987. The worker was discharged from HRC with restrictions against prolonged weight bearing, heavy lifting and low level work. The worker's regular job was within these restrictions. However, the restrictions did not take into account neck pain which prevented the worker from doing the driving necessary for his job.

The worker was entitled to full benefits. The appeal was allowed. [4 pages]

DECISION NO. 688/90 (08/11/90) Faubert Drennan Apsey
Service Leasing Corp. of Canada Ltd. v. Szombati*Section 15 application - Jurisdiction, Tribunal (section 15) (initial entitlement).*

The defendants in a civil case applied to determine whether the plaintiff's right of action was taken away. The plaintiff and the defendants also both requested that the Panel make a declaration that the worker is entitled to recover benefits.

On the evidence, the plaintiff and the defendant worker were both in the course of employment at the time of a motor vehicle accident. The plaintiff's right of action was taken away against the defendant worker and his employer.

The plaintiff had put in a claim with the Board but no action had been taken with respect to payment. In requesting the declaration as to entitlement, there was no attempt to avoid the usual process of the Board. The Panel stated that the worker had a right to compensation for the injuries sustained in the accident. The Panel noted that it was making no finding as to the nature and extent of injuries or as to the amount of benefits payable. [8 pages]

WCAT Decisions Considered: Decision No. 1249/87 (1988), 8 W.C.A.T.R. 300; Decision No. 105/89

DECISION NO. 745/89 (09/11/90) Onen Rao Preston*Disablement (repetitive work) - Osteoarthritis (knee) - Obesity - Utilities (line worker) - Procedure (post-hearing evidence).*

The worker was a lineman for a utility company. He climbed poles to install wires. The worker appealed a decision of the Hearings Officer denying entitlement for bilateral knee osteoarthritis.

In a procedural matter, the Panel refused to allow the employer to submit a medical report in response to post-hearing medical evidence obtained by the Panel. Parties are given an opportunity to make submissions on the evidence obtained by the Panel but they are not allowed to present further evidence.

The worker's left knee condition was relatively mild. There were a number of possible causes for the osteoarthritis, including obesity, ageing and the pole-climbing. His weight and age played a role in the development of the condition. However, the pole-climbing was also a significant contributing factor. Further, there was a synergistic relationship between the worker's weight and the pole-climbing. There was evidence that stress is greater on descent from poles where the worker is heavier.

The osteoarthritis in the right knee was more severe. The worker had a non-compensable meniscectomy. Medical experts agreed that this surgery strongly predisposes an individual to developing osteoarthritis. In

addition, the worker had a slight varus deformity in the right knee. This could also result from a meniscectomy and could contribute to development of osteoarthritis. While these factors were additional causes of the worker's condition, the Panel was satisfied that the pole-climbing was also a significant contributing factor.

The appeal was allowed. [11 pages]

DECISION NO. 14/90R2 (09/11/90) Strachan McCombie Barbeau

Reconsideration.

The worker's request to reconsider Decision No. 14/90R was denied. [2 pages]

WCAT Decisions Considered: Decision No. 14/90R

DECISION NO. 672/90 (09/11/90) Sandomirsky Robillard Ronson

Supplements, older worker.

The worker appealed a decision of the Hearings Officer denying entitlement to an older worker supplement in 1985. The worker had been a labourer. He had a grade 5 French education. He took early retirement in 1984 after a general lay-off was announced. He was 52 years old in 1985.

The Panel found that the worker qualified as an "older worker". His impairment of earning capacity was significantly greater than usual, considering his age, long term employment with a small employer in a small community, lack of skills and education, difficulties in communicating in English and his requirement for modified work.

The worker was unable to return to work with the accident employer. He had made some unsuccessful attempts to find suitable employment. The Panel was satisfied that the worker had a sincere willingness to return to modified work. The worker was also not a candidate for rehabilitation, considering his age, education and limited skills.

The worker was entitled to the older worker supplement from 1985 to July 1989, when he was awarded a supplement under the provisions of Bill 162. The appeal was allowed. [8 pages]

WCAT Decisions Considered: Decision No. 320/88 (1988), 9 W.C.A.T.R. 292; Decision No. 399/88 (1989), 10 W.C.A.T.R. 205; Decision No. 737/88 (1988), 10 W.C.A.T.R. 318; Decision No. 378/89 (1989), 11 W.C.A.T.R. 345; Decision No. 729/89 (1989), 12 W.C.A.T.R. 251

Board Directives and Guidelines: Claims Adjudication Branch Procedures Manual, Document no. 33-20-17; Operational Policy Manual, Document no. 05-03-09

DECISION NO. 806/90 (09/11/90) Onen Rao Chapman

Access to worker file, s. 77 (issue in dispute).

Access to the worker's file was denied. There was confusion as to the identification of the issue in dispute by the Board. [4 pages]

DECISION NO. 809/90 (09/11/90) Onen Rao Chapman

Access to worker file, s. 77.

Access to the worker's file was granted to the employer. [3 pages]

DECISION NO. 810/90 (09/11/90) Starkman Ferrari Jago

Temporary partial disability.

The worker suffered a back injury in 1980, for which he was awarded a pension. The worker appealed a decision of the Hearings Officer granting 50% temporary partial disability benefits from June 1985 to May 1986. The preponderance of medical evidence indicated that the worker was partially, and not totally, disabled during the period in question. The appeal was dismissed. [6 pages]

DECISION NO. 814/90I (09/11/90) McIntosh-Janis Drennan Apsey

Maximal medical rehabilitation - Adjournment (notice).

The worker appealed decisions denying an increase in his pension for chronic pain and denying temporary benefits for a shoulder condition subsequent to October 1984.

There was only one medical report that indicated that the worker had recovered from his shoulder injury sufficiently to return to work. This report was anomalous, considering the preponderance of medical evidence that indicated that the worker continued to be disabled by the shoulder condition. On the evidence, the worker reached maximal medical rehabilitation by August 1985. He was entitled to full temporary partial disability benefits until then and to a pension thereafter.

The hearing would reconvene regarding the chronic pain issue after all the relevant employers were notified. The worker had suffered several injuries with different employers but not all of them had received notice. [6 pages]

DECISION NO. 572/90 (13/11/90) Hartman Lebert Jago

Access to worker file, s. 77.

The worker appealed a decision granting the employer access to the worker's file. The issue in dispute was SIEF. The documents were relevant to the issue in dispute. The appeal was dismissed.

Prior to release of the decision, the employer advised that it had been granted SIEF relief and that, therefore, there was no longer an issue in dispute. In the circumstances, the Panel made no direction for release of the documents. [3 pages]

DECISION NO. 870/88 (14/11/90) Starkman Fox Nipshagen

*Supplements, temporary (partial award) - Board Directives and Guidelines (supplements, temporary) (extension)
- Rehabilitation, vocational (program not offered by Board) - Availability for employment (job search).*

The worker appealed a decision of the Appeal Board denying a temporary supplement. The worker suffered a back injury in 1979. In 1984, the Appeal Board awarded a 15% pension retroactive to June 1981. However, the Appeal Board denied a supplement to the pension.

The worker's impairment of earning capacity was significantly greater than usual, according to the Board's policy in effect at the time. However, the worker considered himself totally disabled and was not making serious efforts to find work. Also, from 1981 to 1984, the Board did not offer any vocational rehabilitation assistance since, at the time, it did not consider him to be entitled to benefits. The Panel found that the worker was entitled to a supplement from 1981 to 1984, but only at the 50% rate due to lack of efforts to find employment.

The Board's policy was not to extend supplements for periods beyond 36 months. The Panel found that the worker continued to meet the threshold test for a supplement from 1984 until his return to work in 1987. However, he was not making a serious effort to return to work during this period as well. Therefore, he was entitled to benefits at the 50% level.

The appeal was allowed in part. The worker was entitled to a supplement at the 50% level from 1981 to 1987. [11 pages]

WCAT Decisions Considered: 870/88L

Board Directives and Guidelines: Claims Services Division Manual, s.45(1), p. 134, Directive 1

DECISION NO. 286/89 (14/11/90) Carlan Lebert Nipshagen

In the course of employment (fighting) - Procedure (submissions) (decision reviews).

The worker appealed a decision of the Hearings Officer denying entitlement for a disability arising from an altercation at work.

In a preliminary matter, the Panel dismissed the employer's objection to inclusion on the record of a Decision Review of Tribunal cases about fights, prepared by Tribunal Counsel. The Panel noted that the Decision Review was simply a tool for representatives and panels in understanding developing jurisprudence. It was open to the employer to dispute the analysis in the Review or to introduce additional cases to support its position.

The worker was a productive employee with a volatile temper. A co-worker took the fork lift that the worker was using. The worker attempted to hurt the co-worker, the co-worker retaliated and hit the worker.

The altercation was the accumulation of a number of events which were related directly to work. These events included holding the worker up as a model to other workers, animosity as a result of the worker bumping other workers pursuant to a collective agreement and horseplay activities. The actual incident began with removal of the worker's fork lift. The Panel found that the worker did not take himself out of the course of employment. The appeal was allowed. [6 pages]

DECISION NO. 570/90 (14/11/90) Hartman Lebert Jago

Access to worker file, s. 77.

Access to the worker's file was granted to the employer. [3 pages]

DECISION NO. 656/90 (14/11/90) Moore McCombie Jago

Disablement (change in work).

The worker appealed a decision of the Hearings Officer denying entitlement for a ruptured tendon in the worker's thumb. For three or four days prior to onset of the injury, the worker was performing a job in which he used his thumb to press wires into a metal groove. The onset of the injury actually occurred at home.

There was a temporal relationship between employment and the rupture of the tendon. However, the preponderance of medical evidence did not support a relationship. The stresses of the job were not likely to lead to rupture of the tendon in question. Gradual degeneration was the likely cause of the injury. Even if the work was sufficient to trigger the rupture, it was only of minimal significance, considering the preexisting degeneration. The appeal was dismissed. [7 pages]

DECISION NO. 670/90 (14/11/90) Hartman McCombie Apsey

Death (maintenance of claim by estate) - Standing.

The parents of a deceased worker appealed a decision of the Hearings Officer denying a claim for renovation expenses. The Board had already paid the worker about \$37,000 for renovations. This claim was by the parents for miscellaneous expenses totalling \$11,000 for home modifications.

The worker died without a will. No steps had been taken to authorize a personal representative to act in his stead. The claim was on behalf of the parents, not the estate of the worker. Parents of a deceased worker have no rights under the Act unless they are dependants. In this case, the Board had previously denied dependency benefits, finding that the parents were not dependants. Therefore, the parents were strangers to the Act and did not have standing to bring this appeal. The Tribunal lacked jurisdiction. [4 pages]

WCAT Decisions Considered: Decision No. 113/89 (1989), 10 W.C.A.T.R. 355; Decision No. 176/88

DECISION NO. 731/90 (14/11/90) Marafioti Fox Nipshagen

Access to worker file, s. 77.

Access to the worker's file was granted to the employer. [4 pages]

DECISION NO. 732/90 (14/11/90) Marafioti Fox Barbeau

Access to worker file, s. 77.

Access to the worker's file was granted to the employer. [4 pages]

DECISION NO. 733/90 (14/11/90) Marafioti Fox Barbeau

Access to worker file, s. 77.

Access to the worker's file was granted to the employer. [4 pages]

DECISION NO. 207R2 (15/11/90) Bigras Robillard Preston

Reconsideration.

The worker's request to reconsider Decision No. 207R was denied. [4 pages]

WCAT Decisions Considered: Decision No. 95R (1989), 11 W.C.A.T.R. 1; Decision Nos. 72R, 72R2, 207, 207R

DECISION NO. 894/88 (15/11/90) McGrath Fox Guillemette

Causation (thin skull doctrine) - Exposure (dust) - Exposure (epoxy resin) - Asthma - Hernia (inguinal) - Parties (representation) (representative giving evidence).

A labourer suffered a compensable inguinal hernia in November 1983. He was unable to undergo surgery to repair the hernia until April 1985 due to bronchial asthma. The Board paid temporary total disability benefits until November 1984, when it determined that the asthma was not a compensable condition. Then it paid benefits at the 50% rate from November 1984 to April 1985, when the surgery was performed and full benefits were reinstated. The worker appealed denial of entitlement to benefits for asthma and denial of full benefits from November 1984 to April 1985.

The representative of the employer was also a witness for the employer. In a preliminary matter, the Panel ruled that this in no way prejudiced the worker.

The worker claimed that the asthma was related to exposure to dust and epoxy resins at work. Considering the medical evidence, the Panel found that sudden and severe exposure to dust might cause an acute aggravation of an asthmatic condition but would not lead to prolonged difficulties. Exposure to epoxy resins could produce a severe asthmatic attack. However, the evidence of exposure and resulting attacks was vague and unconvincing. The worker was not entitled to benefits for asthma.

The worker's asthmatic condition came within the "thin skull" doctrine. The asthmatic condition, combined with the compensable hernia, produced a period of total disability while waiting for the hernia surgery. The hernia was a significant contributing factor to the total disability. The worker was entitled to temporary total disability benefits subsequent to November 1984. [11 pages]

WCAT Decisions Considered: Decision No. 915 (1987), 7 W.C.A.T.R. 1; Decision No. 1246/87 (1988), 9 W.C.A.T.R. 210

DECISION NO. 34/90 (15/11/90) Moore Robillard Shuel

Continuing entitlement - Intervening causes - Second accident.

The worker suffered a compensable back injury in May 1963. In July 1963, the worker was involved in a non-compensable accident, which left him a quadriplegic. The worker appealed a decision of the Board's Appeal Tribunal denying benefits subsequent to December 1963.

On the evidence, the worker continued to experience back pain related to the compensable accident from the time of the accident to the present. Therefore, the worker's benefits should not have been terminated in December 1963. The condition was permanent by that time. The matter was referred back to the Board to determine the level and amount of benefits. The appeal was allowed. [9 pages]

DECISION NO. 441/90 (15/11/90) Lax Ferrari Barbeau

Continuing entitlement.

From 1961 to 1975, the worker suffered four minor industrial accidents resulting in low back injury. Each of these accidents led to a minimal period of lost time, followed by a return to regular duties. In 1984 the worker began a position with a municipality which involved driving a front end loader and also some physical yard work. In 1986, the worker stopped working due to problems extending through his entire body.

The worker was not entitled to any further benefits. There was no unusual trauma to account for the present disability. Nothing in the front end loader job duties would give rise to the worker's present disability. The back condition could not be separated from the worker's general physical condition which included his upper back, mid back, shoulders, hands, hypertension, headaches and arthritis. The 1975 accident could not explain the difference between an essentially normal 1965 x-ray and a 1986 x-ray which showed degenerative changes extending throughout the lumbar spine. [6 pages]

**DECISION NO. 658/90 (15/11/90) Moore McCombie Jago
Riddell v. Mellin**

Section 15 application - Employer (definition of) - Farming.

The defendants in a civil case applied to determine whether the plaintiff's right of action was taken away. The issue was whether the plaintiff was a Schedule 1 employer.

The plaintiff was a farmer. He ran the farm largely by himself. However, he did have assistance from his son, his grandson and contract harvesters.

Neither the son nor the grandson could be considered to have performed services under a contract of hiring as required by the definition of employer in s.1(1)(k). A contract consists of an exchange of promises, express or implied. The son owned a nearby farm. The plaintiff and his son worked on each other's farms on a cooperative basis. There were no express or implied contractual obligations. The grandson performed occasional chores, after which the plaintiff would offer his grandson some sums of money, usually \$5 to \$10. The payments were in the nature of an allowance within a family and could not be considered remuneration pursuant to an employment contract.

The harvesters performed a specific service for a set fee. They used their own equipment and worked without supervision. The Panel found that they were independent operators. Even if they were workers, they worked for a short period of time and, according to the evidence, were not performing any services at the time of the accident.

The Panel concluded that the plaintiff was not a Schedule 1 employer. There was no evidence that he had personal coverage under s.11. Therefore, he was not a worker. His right of action was not taken away. [8 pages]

DECISION NO. 820/90 (15/11/90) Onen Rao Chapman

Access to worker file, s. 77.

Access to the worker's file was granted to the employer. [3 pages]

DECISION NO. 948/88 (16/11/90) Strachan Heard Apsey

Earnings basis (period of unemployment) - Earnings basis (unemployment insurance benefits) - Words and phrases (earnings, s.43(1)) - Words and phrases (remuneration, s. 1(1)(i)).

The worker appealed a decision regarding the earnings basis for calculation of his pension. From May 1980 until a lay-off in June 1982, the worker was a welder-assembler. After that, he collected unemployment insurance benefits and worked part-time as a physical education instructor. He was injured in February 1983 while engaged in this part-time work. His pension was calculated by taking his earnings over the previous year, excluding unemployment insurance benefits, and averaging that amount over the full 12 months.

Section 43(1) of the pre-1985 Act provides that a pension should be calculated on the basis of earnings during the 12 months immediately preceding the accident "or such lesser period as he has been employed". The legislators attempted to build in the legislation broad language and sufficient discretion to enable an equitable result to emerge in most cases.

There were a number of approaches which the worker asked the Panel to consider. One approach was to use only the earnings as a welder from February 1982 to June 1982 and to divide that amount by those 22 weeks of employment. The worker submitted that this base should be used since welding was his normal occupation. However, the Panel rejected this approach since the worker was not injured while engaged in that occupation. He was performing duties for a different employer at a much lower wage rate.

Another approach was to calculate benefits on the basis of the salary of a full-time physical education instructor. The Panel rejected this approach since the worker was not hired as a full-time instructor and since the calculation should take into account employment reality where possible.

Another approach was to include unemployment insurance benefits in the earnings of the worker. The Panel rejected this approach as well. Neither case law nor dictionary definitions established that this sort of social wage came within the definition in s.1(1)(i) of "earnings" or "remuneration". In this case, it was not necessary to distort the plain meaning of the words in order to arrive at an equitable result.

Each case involving the earnings basis should be determined on its own facts. Section 43(1) contemplated use of a period of less than 12 months. That lesser period should be the cumulative period of time during the previous year that the worker was employed. The Panel determined the earnings basis by taking the worker's actual earnings during the 22 weeks of employment as a welder and the 14 weeks of employment as a physical education instructor and divided that amount by the actual 36 weeks that the worker was employed, as opposed to the 52 weeks used in the Board calculation.

The appeal was allowed in part. [13 pages]

WCAT Decisions Considered: Decision No. 934/88 (1989), 11 W.C.A.T.R. 196; Decision No. 994/88 (1989), 12 W.C.A.T.R. 61
Cases Considered: Strand vs Hansen Seaway Service Ltd., 614 F. 2d 572 (1980); Visan v. M.N.R. (1983), 46 N.R. 494

DECISION NO. 166/90 (16/11/90) Signoroni Drennan Aspey*Commutation (debt liquidation).*

The worker appealed a decision of the Hearings Officer denying partial commutation of the worker's pension. The worker wanted the commutation for the purpose of paying off debts. He claimed that his debts were contributing to his depression. The worker had a monthly deficit of \$30 to \$85.

The Panel found that the main factor in the worker's depression was marital problems. The Panel noted that the worker paid \$800 per month in child support and that this may not be payable for much longer, given that his children were 18 and 20 years old. The worker's request did not meet the current Board policy for commutation. The appeal was dismissed. [5 pages]

DECISION NO. 344/90 (16/11/90) McGrath Beattie Apsey*Continuing entitlement.*

A nurses aide appealed a decision of the Hearings Officer denying entitlement for a shoulder condition subsequent to May 1988. The worker suffered the injury in July 1987 while trying to prevent a patient from falling.

The Board relied on the opinion of a Board doctor that the worker only sprained her shoulder in the accident. The Panel found that the worker suffered rotator cuff calcific tendonitis with a tear of the rotator cuff tendon. The worker was not capable of returning to her regular work in May 1988. She was entitled to full temporary partial disability benefits until May 1990 and to a pension assessment. The appeal was allowed. [11 pages]

DECISION NO. 571/90 (16/11/90) Hartman Lebert Jago*Procedure (section 77) (no request for access) - Access to worker file, s. 77.*

The worker's claim due to stress, on the basis of alleged incidents of physical or mental abuse occurring at work, was denied by the Board. The employer wrote to the Board saying that if the Board were to receive an objection from the worker, the Board should advise the employer, who would then advise as to whether or not it wished to exercise its right to access to the file under s. 77 of the Act.

The Panel concluded that the correspondence revealed no request for access by the employer such as to trigger the provisions of s. 77. The letter made it clear that the employer was postponing the decision as to whether it would exercise its access rights until the Board had advised that the worker was appealing. The Panel expressed concern that the Board presumed the request for access when in fact none was made, and it stressed the importance of meeting statutory procedures and all safeguards. However, it was satisfied that neither the employer or worker was at a disadvantage because of the Board's oversight. The employer, having made submissions and participated in the appeal, had effectively made a request for access. There was no useful purpose to be served in returning the matter to the Board at this time.

The report objected to by the worker concerned a psychiatric assessment in October 1987. It addressed the worker's state of anxiety in and around the period of lay-off. It appeared relevant to the claim for unrelated stress over the period in which work incidents were alleged, 1985 to 1989. The Board was directed to forward the document to the employer. [5 pages]

DECISION NO. 702/88 (19/11/90) Signoroni Cook Barbeau

Pensions (assessment) (finger) - Supplements, temporary (wage loss) - Significantly greater than is usual.

The worker suffered a right thumb injury in 1983, for which he was awarded a 4% pension. The worker appealed a decision of the Hearings Officer denying an increase in the pension and denying a wage loss supplement.

On the evidence, the worker's thumb condition deteriorated in February 1989 after a compensable aggravation. He was entitled to a 7.5% pension from that date.

Prior to the 1983 accident, the worker was a welder. After the accident, the worker returned to work as a general helper at a wage of 50 cents per hour less. Taking the pension into account, the actual wage loss experienced by the worker fluctuated from about \$14 to \$25 per month. His impairment of earning capacity was not significantly greater than is usual. He was not entitled to a supplement. [8 pages]

WCAT Decisions Considered: 702/88/

DECISION NO. 322/89I (19/11/90) Carlan Heard Apsey

Stress (burnout) - Accident (definition of) (effects of disciplinary actions) - Continuing entitlement - Firefighter.

The worker sought benefits for a low back condition arising out of two previous compensable accidents which had occurred in 1973 and 1974, for "burnout" as a result of 20 years as a firefighter in an understaffed department, and for stress arising out of his demotion from captain to first class firefighter when his small-town department was amalgamated with that of a larger city in July 1985. The worker laid off from work in May 1986.

The claim for the back condition was denied. No treatment was received between 1974 and 1979. The worker suffered non-compensable accidents in 1979 and 1983. The worker did not have to modify his job duties after 1974 because of the back condition. If the worker's current degenerative condition were related to trauma, it would more likely be related to the more recent non-compensable trauma.

The burnout claim was also denied. The worker's lay-off did not appear to be attributable to the possibly inherently stressful nature of the work. The worker had performed the job for 20 years without complaints of that nature. This was not the case of someone who had just been doing the job for too long. The evidence indicated that the worker would have continued to work if he had not been transferred or demoted.

There was insufficient evidence to make a decision on the stress claim. The Panel reviewed the testimony and documentary evidence that would be required at the reconvened hearing. The Panel requested further submissions on the issues as to whether personnel actions, such as demotions or dismissals, fell within the definition of "accident" under the Act and as to the determination of the point when mental injuries became disabling. A relevant Board policy proposal, together with worker and employer submissions in response to that proposal and related Tribunal decisions, were also reviewed. [13 pages]

WCAT Decisions Considered: Decision No. 1018/87 (1989), 10 W.C.A.T.R. 82; Decision No. 980/89 (1990), 13 W.C.A.T.R. 304; Decision No. 568/89

DECISION NO. 1037/89 (19/11/90) Moore Cook Jago

Second Injury and Enhancement Fund (preexisting condition).

The employer appealed a decision of the Hearings Officer granting only 50% SIEF relief. There was no evidence that the worker's preexisting condition was more than minor. The appeal was dismissed. [7 pages]

Board Directives and Guidelines: Claims Adjudication Branch Procedures Manual, Document no. 33-28-03;
Claims Services Division Manual, s.108(2), p.235, Directive 1

DECISION NO. 241/90 (19/11/90) Hartman Robillard Nipshagen

Aggravation (preexisting condition) (knock knees).

The worker was entitled to benefits for a lay-off from work in October 1981 which was due to aggravation of a preexisting congenital condition commonly known as knock knees (jenu valgum and recurvatum). In July 1979 the worker fell down four or five steps, landing on his knees, but there was no lost time claimed for that fall. In July 1981 the worker fell part way down a manhole striking both of his knees. These two work-related traumas contributed to the condition becoming symptomatic. [8 pages]

DECISION NO. 662/90 (19/11/90) Signoroni Drennan Nipshagen
Royal Insurance v. Maier

Section 15 application (motor vehicle insurance) - Jurisdiction, Tribunal (section 15) (initial entitlement) - In the course of employment (proceeding to and from work).

The plaintiff was sitting in a co-worker's car near a job site when it was struck by another vehicle. Rather than making a claim for workers' compensation benefits, the plaintiff requested no fault benefits from the co-worker's insurer. The insurer denied them on the basis that the worker was entitled to receive workers' compensation benefits. The plaintiff commenced an action against the insurer. The insurer brought this s.15 application to determine the plaintiff's status.

The Panel found that the plaintiff and the insurer were parties to an action within the meaning of s.15.

The Panel reviewed Tribunal decisions regarding the Tribunal's jurisdiction to determine matters regarding entitlement pursuant to s.15. The Panel found that s.15 requires the Tribunal to decide entitlement to benefits when it is asked to do so without making a determination concerning the right to sue.

The Tribunal was required to determine the right to compensation, rather than the right to claim compensation as determined in Decision No. 1025/89.

The right to compensation involved a determination of whether the alleged injury arose out of and in the course of employment. The Panel would not determine the nature and extent of benefits.

In this case, the worker was in the course of employment. He was in the co-worker's car. However, they were still parked and had not left the job site. Further, the co-worker used his car to transport materials to and from the job site. The Panel found that the worker was entitled to compensation. [12 pages]

WCAT Decisions Considered: Decision No. 86 (1986), 2 W.C.A.T.R. 52; Decision No. 1249/87 (1988), 8 W.C.A.T.R. 300;
Decision Nos. 462/88, 105/89, 1025/89
Cases Considered: Madill v. Chu (1976), 71 D.L.R. (3d) 295

DECISION NO. 681/90 (19/11/90) McGrath Lebert Preston

Access to worker file, s. 77.

Access to the worker's file was granted to the employer. [3 pages]

DECISION NO. 714/90 (19/11/90) Bigras Ferrari Barbeau

Commutation (debt liquidation) - Board Directives and Guidelines (commutation) (retirement).

The worker appealed a decision of the Hearings Officer denying commutation of the worker's pension, which he wanted for the purposes of paying off debts and buying a new car.

The worker did not meet the requirements of the Board policy. Since he had retired, there was no rehabilitative purpose in the sense of obtaining or maintaining suitable employment. There was no indication that the worker could not cope with physical or psychological problems. The worker was not in a deficit situation. A commutation might improve the worker's financial situation slightly. However, there was no necessity for a commutation from any social, psychological or medical point of view. The appeal was dismissed. [6 pages]

WCAT Decisions Considered: Decision No. 235/88 (1988), 8 W.C.A.T.R. 347

Board Directives and Guidelines: Operational Policy Manual, Document no. 05-03-08; Commutation of Pensions

Policy, Board Minute 4, April 3, 1987, p.5186; Guidelines for the Commutation of Pension, January 15, 1988;

Guidelines for the Commutation of Pensions, Board Minute 3, March 20, 1989, p.71

DECISION NO. 716/90 (19/11/90) Bigras Ferrari Barbeau

Commutation (home purchase).

The worker appealed a decision of the Hearings Officer denying commutation of the worker's pension for the purpose of buying a home. Since the compensable accident, the worker had retrained and returned to work with the accident employer at an upgraded position. In this case, the worker was fully rehabilitated. There was no rehabilitative purpose to the commutation. The appeal was dismissed. [9 pages]

Board Directives and Guidelines: Guidelines for the Commutation of Pensions, Board Minute 3, March 20, 1989

DECISION NO. 722/90 (19/11/90) Robeson Fox Chapman

Access to worker file, s. 77.

Access to the worker's file was granted to the employer. [3 pages]

DECISION NO. 730/90 (19/11/90) Hartman Rao Preston

Medical examination (section 21) - Jurisdiction, constitutional (federal worker) - Collective agreement.

The worker applied for an order that he was not required to attend a medical examination. The examination was requested by the employer under a collective agreement to determine the worker's ability to

return to work. The worker had subsequently returned to work and laid off again. His employment was then terminated.

The Tribunal has previously held that the Tribunal had jurisdiction, even though the worker worked for a federal crown corporation and even though the request was pursuant to a collective agreement.

There was no useful purpose in making any order since the worker had returned to work and since his employment had been terminated. [6 pages]

WCAT Decisions Considered: Decision No. 696/88 (1989), 10 W.C.A.T.R. 308; Decision No. 981/87
Other Statutes Considered: Government Employees Compensation Act, R.S.C. 1985 c.G-5, s.4

DECISION NO. 835/90 (19/11/90) McIntosh-Janis Drennan Meslin

Withdrawal (of appeal).

The worker was allowed to withdraw his appeal without prejudice, in order to pursue a number of issues together. [3 pages]

DECISION NO. 836/90 (19/11/90) Strachan Jackson Jago

Board Directives and Guidelines (penalty assessments) (distortions) - Board Directives and Guidelines (penalty assessments) (distortions) (onus of proof).

The employer appealed a penalty assessment levied against it for the years 1983, 1984 and 1985. The employer operated a home-cleaning franchise which employed 14 cleaners. It was classified by the Board under rate group 907.

Board policy suggested that a single claim might be evidence of a distortion in the employer's accident cost history and that if such were the case, the penalty assessment would be eliminated. The Panel was of the view that once an employer had met the threshold test of demonstrating that elimination of the costs of one particular claim would remove the firm from the criteria used for levying a penalty assessment, the policy justified the conclusion that the burden of proof should then shift to the Board to demonstrate why this apparent distortion in the accident cost record should not result in the elimination or suspension of the assessment. In this case the employer had clearly met this threshold test as the elimination of one claim would eliminate its lifetime deficit.

In finding that there was no distortion by a single claim, the Hearings Officer focused on the firm's frequency rate, which was in excess of that for the rate group. He also noted that the employer's costs continued to be in a deficit for 1986, 1987 and 1988.

The employer did not become aware of the penalty assessment and of the significance of frequency rates until 1987. In 1986 it had seven work accidents, in 1987 three accidents, in 1988 two accidents, and no accidents in 1989 or 1990. One reason for this Board policy which eliminated penalty assessments arising from one large claim that could distort the employer's cost record, was consideration of the hardship that it could work on a small employer.

The Board had not discharged its obligation to demonstrate why the penalty assessment should not be suspended, particularly considering the effectiveness of the safety program implemented by the employer. The appeal was allowed and the penalty assessment suspended. [12 pages]

Board Directives and Guidelines: Additional Assessments Policies and Procedures, Board Minute 6, January 14, 1975, p.4419

DECISION NO. 826/87 (20/11/90) Strachan Ferrari Ronson

Health care (chiropractic) - Health care (medical aid) (alternative treatment) - Consequences of injury (iatrogenic illness) (medication) (chymopapain) - Arachnoiditis - Travel expenses (treatment).

The worker appealed a decision of the Hearings Officer limiting chiropractic treatment, denying entitlement for scrotal pain and denying expenses for trips to a pain clinic in the United States for treatment.

The worker suffered a low back injury in 1975. He underwent a discectomy in 1977 and chemonucleolysis in 1978. He was awarded a 10% pension in 1977, increased to 20% in 1980, to 35% in 1981 and to 60% in 1988.

The worker's condition was continuing to deteriorate. The chiropractic treatments gave the worker relief and were a reasonable alternative to excessive drug use. The worker was entitled to further chiropractic treatment, taking into account the recommendations of the worker's doctors.

The preponderance of medical opinion supported the Panel's conclusion that the worker suffered from arachnoiditis and that this was a contributing factor to his scrotal pain. The worker received injections of chymopapain in 1978. Conventional medical wisdom now appears to hold that this is not advisable for patients who have undergone surgery for protruding discs, as this worker had done in 1977. There was a causal relationship between the accident (and the resulting treatment) and the development of arachnoiditis (and scrotal pain). Therefore, the worker was entitled to benefits for scrotal pain.

The worker attended a pain clinic in the United States and wanted to return there for colchicine treatment for the arachnoiditis. There was limited information regarding this process but there was some indication of a 25% success rate in the treatment of arachnoiditis. The treatment was not readily available in Canada. The worker was aware of possible side effects and was prepared to bear the risk, suggesting that it paled by comparison to the pain he has experienced and continues to experience. In the circumstances, the Panel found that the worker should be entitled to expenses to attend for the treatment.

The appeal was allowed. [20 pages]

DECISION NO. 1255/87R (20/11/90) Signoroni McCombie Aspey

Reconsideration.

The worker's request to reconsider Decision No. 1255/87 was denied. A new medical report was not significantly different than reports before the Panel. [4 pages]

WCAT Decisions Considered: Decision No. 95R (1989), 11 W.C.A.T.R. 1; Decision Nos. 72R, 72R2, 1255/87

DECISION NO. 374/90R (20/11/90) Faubert Beattie Apsey

Reconsideration - Procedure (post-hearing evidence).

The worker's request to reconsider Decision No. 374/90 was denied. In Decision No. 374/90, the worker's request for a commutation of his pension was denied. The worker submitted new evidence in the form of a letter from a creditor stating that it may have to take legal action. This letter was sent to the original Panel after the hearing and after the decision had been reached but before the decision was released. The original Panel was of the opinion that it no longer had discretion to admit the evidence since the decision

making process was complete. Even if the evidence had been considered, the Panel would likely have reached the same conclusion. [4 pages]

WCAT Decisions Considered: Decision No. 95R (1989), 11 W.C.A.T.R. 1; Decision Nos. 72R, 72R2, 170I, 374/90

DECISION NO. 477/90 (20/11/90) Bigras Robillard Barbeau

Supplements, temporary (rehabilitative purpose) (retroactivity) - Impairment of earning capacity - Significantly greater than is usual.

The worker suffered a compensable neck and shoulder strain in October 1976. In September 1980, the worker was awarded a 10% pension, later increased to 20%. He received a supplement from September 1980 to January 1982. In 1986, the Hearings Officer restored the supplement, effective January 1982. The employer appealed the decision of the Hearings Officer.

The employer submitted that it was contrary to the intent of the Act to award a supplement retroactively since supplements are provided for rehabilitative purposes. The Panel found that the Hearings Officer could make such a decision. He had to determine whether the worker had a right to the supplement at the time at issue. The rehabilitative purpose of the supplement was not lost. It was considered in the qualification requirements for entitlement.

After entitlement is granted, it is proper to consider whether the worker later became disqualified. In this case, the worker's situation did not change. Therefore, the issue of entitlement turns on the worker's entitlement at the beginning of the period.

The worker met the threshold test of the old Board policy. He was unable to return to his physically-demanding pre-accident job as a diamond drill helper or to an occupation with comparable income. He lacked the education and skills to be considered for other types of employment. The worker also met the threshold test of the new Board policy in 1987. His impairment of earning capacity was significantly greater than is usual considering his lack of education and job skills and the poor employment situation in the area.

The worker looked for employment and did not fail to cooperate with rehabilitation. He was not disqualified from receiving the supplement.

The appeal was dismissed. [22 pages]

Board Directives and Guidelines: Claims Services Division Manual, s.45(5), p.134, Directive 1; Policy on Supplementary Benefits under s.45(5) of the Act, Board Minute 1(a), November 16, 1987, p.52

DECISION NO. 660/90L (20/11/90) Chapnik Fox Apsey

Leave to appeal (good reason to doubt correctness) (consideration of evidence).

The worker suffered a compensable accident in 1979. The worker applied for leave to appeal a decision of the Appeal Board denying further entitlement for incidents in 1982 and 1983.

The Appeal Board made its findings without reviewing the facts or explaining the rationale for its decision. There was evidence of strenuous work and a specific incident. The Appeal Board made no finding of credibility regarding the worker's evidence and no review of the worker's evidence.

Leave to appeal was granted. [4 pages]

DECISION NO. 677/90 (20/11/90) Bigras Robillard Shuel*Supplements, older worker.*

The worker sought an older worker supplement for a period in 1985. At that time he was aged 51 and was receiving a 15% pension for his low back condition.

Though the worker's loss of actual earnings was greater than recognized by the 15% pension, it was the impairment of earning capacity that had to be considered. The worker did have severe lifting, bending and low level work restrictions, but there was no evidence that he could not perform any work. He made no serious attempts to find work and he refused to try any job other than his job as a service station attendant. The worker's earning capacity was not impaired to a higher than usual degree.

The worker was also not entitled to a supplement on the further ground that it had not been shown that he would not benefit from rehabilitation. The worker's rehabilitation file had been closed not because he could not be rehabilitated, but because he was collecting unemployment benefits, he was financially self-sufficient and he was claiming to be totally disabled. There was no evidence that he was totally disabled. [6 pages]

WCAT Decisions Considered: Decision No. 320/88 (1988), 9 W.C.A.T.R. 292

DECISION NO. 808/90 (20/11/90) Signoroni Higson Meslin*Pensions (assessment) (foot).*

The worker had a foot condition for which he was receiving a 2% pension. He appealed a decision of the Hearings Officer denying an increase in the pension.

The worker had a clawed second toe. He experienced a burning sensation when standing beyond a short period of time. He experienced symptoms when sitting for lengthy periods. The condition also affected his big toe and his third toe. In addition, there were medical reports referring to the possibility of peripheral neuropathy. In these circumstances, it was not appropriate to base the worker's award on the Rating Schedule for amputation of one toe. The Panel raised the worker's pension to 5%. The appeal was allowed. [8 pages]

DECISION NO. 812/90 (20/11/90) Signoroni Fuhrman Meslin*Subsequent incidents (outside work).*

The worker suffered a compensable low back injury in September 1987 and returned to work in November 1987. In June 1988, he suffered an onset of back pain outside work while getting up from a chair. The worker appealed a decision of the Hearings Officer denying entitlement for the incident in 1988.

The worker had a number of other back injuries prior to the 1987 accident. There was a lack of continuity of treatment following the 1987 accident. The Panel found that the worker had a weak back. There was no evidence that the worker's condition from the 1987 accident had not resolved. The appeal was dismissed. [7 pages]

DECISION NO. 819/90 (20/11/90) Sandomirsky McCombie Nipshagen*Continuity (of treatment).*

A truck driver injured his low back and his right leg in April 1983 when some produce fell on him, pinning his legs and causing him to fall back on the floor. He was awarded a 10% pension for the leg injury. The worker appealed a decision of the Hearings Officer denying ongoing benefits for the back condition.

There was a lack of continuity of treatment and complaint regarding the back from 1983 to 1986. The Panel concluded that the ongoing back condition did not result from the 1983 accident. The appeal was dismissed. [7 pages]

WCAT Decisions Considered: Decision No. 32 (1986), 2 W.C.A.T.R. 1

DECISION NO. 842/90 (20/11/90) Starkman McCombie Meslin*Access to worker file, s. 77.*

Access to the worker's file was granted to the employer. [3 pages]

DECISION NO. 159/90 (21/11/90) Carlan Beattie Jago*Subsequent incidents (outside work).*

The worker suffered a compensable low back injury in 1978. In 1987, the worker slipped when his leg gave out as he was walking outside his home. The worker appealed a decision of the Hearings Officer denying entitlement for the incident in 1987.

It was not established that the worker had a leg disability related to the accident in 1978. The appeal was dismissed. [4 pages]

DECISION NO. 178/90 (21/11/90) Chapnik Beattie Jago*Temporary partial disability - Availability for employment (job search).*

The worker suffered a neck and shoulder injury in April 1987. The worker appealed a decision of the Hearings Officer granting only 50% benefits subsequent to July 1988. On the evidence, the worker was temporarily partially disabled during this period and entitled to 50% benefits since she made no effort to look for employment. She was entitled to 50% benefits until she received her pension in October 1989.

In error, the Board restored full temporary benefits in October 1989. The matter of the overpayment was referred back to the Board.

The appeal was dismissed. [9 pages]

WCAT Decisions Considered: Decision No. 59 (1987), 5 W.C.A.T.R. 17; Decision No. 137 (1987), 4 W.C.A.T.R. 87

DECISION NO. 723/90I (21/11/90) Faubert Drennan Meslin
Kingsway Transports Ltd. v. Paragauskas

Section 15 application (remoteness) - Jurisdiction, Tribunal (section 15) (Occupiers' Liability Act).

The defendant in a civil case applied to determine whether the plaintiff's right of action was taken away. The plaintiff was a temporary office worker who was assigned by her employer to work for the defendant. The plaintiff slipped while on her way to the washroom. The plaintiff brought the action against the defendant, alleging negligence and also basing her claim on the Occupiers' Liability Act.

The plaintiff was a worker of a Schedule 1 employer and was in the course of her employment at the time of the accident.

The Panel agreed with Decision No. 965/87I that the Tribunal had jurisdiction to determine whether the right of action was taken away, even though the action was framed under the Occupiers' Liability Act.

Section 8(9) provides that a worker does not have a right of action if the workers of both employers were in the course of employment. It may be possible for damages to result under the Occupiers' Liability Act without any employment connection on the part of the defendant. There was no evidence or submissions by the parties on the question of whether a worker of the defendant was in the course of employment at the relevant time.

The Panel reserved its decision on this issue and allowed the parties time to produce further evidence or submissions. [10 pages]

WCAT Decisions Considered: Decision No. 84 (1986), 3 W.C.A.T.R. 38; Decision No. 559 (1987), 5 W.C.A.T.R. 78; Decision No. 965/87I (1988) 8 W.C.A.T.R. 214; Decision Nos. 373, 789/88I

Other Statutes Considered: Occupiers' Liability Act, R.S.O. 1980 c.322

Board Directives and Guidelines: Claims Adjudication Branch Procedures Manual, Document no. 33-14-01

DECISION NO. 609/88 (22/11/90) Strachan Lebert Sutherland
Heard v. Piper

Section 15 application (onus of proof) - In the course of employment (travelling) - Executive officers - Supplier of motor vehicle, machinery or equipment - Notice of accident.

The defendants in a civil action applied to determine whether the plaintiff's right of action was taken away. The plaintiff was an account executive for a cosmetics firm. She was responsible for sales, merchandising, accounts, hiring and training of staff at various stores in southwestern Ontario. The plaintiff was involved in a motor vehicle accident while travelling from Kitchener, where she lived, to St. Catharines, where she was going to meet an employee for lunch prior to a scheduled meeting with the same employee. Prior to leaving Kitchener, the plaintiff had attended to personal matters.

The onus in a section 15 application, as in any litigation application, is on the applicant to make its case. Although there were some personal elements to the trip to St. Catharines and although the plaintiff had not attended to business matters yet, the Panel found that the plaintiff was in the course of employment.

The predominant nature of her activity was employment-related. The worker's home was her business base. She received a car allowance. She was required to travel regularly away from the employer's premises.

The plaintiff was not an executive officer. Her activities was analogous to that of an area manager or supervisor.

The plaintiff was not precluded from receiving benefits under s.20. The employer was notified of the accident but advised the plaintiff that this was not a compensation matter.

The right of action was taken away against the defendant driver but not against the defendant leasing company, which supplied the vehicle. The leasing company would not be liable for any damages, contribution or indemnity which would otherwise be recoverable for negligence by the other defendant. [16 pages]

WCAT Decisions Considered: Decision No. 725 (1987), 4 W.C.A.T.R. 266

Cases Considered: Ling v. Transamerica Commercial Corp. Ltd. (1980), 31 O.R. (2d) 32; Zago v. Davies, 32 M.V.R. 1

DECISION NO. 799/90 (22/11/90) Bradbury Beattie Meslin

Supplements, temporary - Earnings basis (short or casual employment) - Travel expenses (to work).

The worker suffered a back injury for which he was awarded a pension. The worker appealed denial of a temporary supplement subsequent to May 1985. He also appealed the earnings basis for calculation of benefits and denial of travel expenses to work.

The worker was not entitled to a supplement. There was no evidence that his impairment of earning capacity was significantly greater than is usual.

The worker's earnings base was calculated correctly. Since he was employed for less than 12 months, the Board calculated the earnings on the basis of the actual period of employment, taking into account earnings from salary and commission.

The worker commuted a distance of 100 miles on a sporadic basis. He did not meet the Board policy requirements of regular or daily commuting. The worker was not entitled to travel expenses.

The appeal was dismissed. [5 pages]

Board Directives and Guidelines: Claims Services Division Manual, s.54, p.194, Directive 7

DECISION NO. 800/90 (22/11/90) Bradbury Beattie Seguin

Suitable employment - Availability for employment (refusing suitable work).

The worker appealed a decision of the Hearings Officer denying benefits subsequent to March 1988. The worker moved from Kingston to Toronto to find employment. He suffered a compensable injury while working as a truck driver in October 1986. The worker moved back to Kingston in June 1987 with the agreement of his rehabilitation counsellor. In January 1988, the accident employer offered modified work as a security guard at the pre-accident wage rate. The worker refused the job since he had settled in Kingston with his family. He continued to look for work in Kingston and, in fact, found work in January 1989.

The Panel agreed with Decision No. 539/89 that the refusal of suitable work did not necessarily disentitle a worker from ongoing benefits.

In this case, the worker cooperated with his rehabilitation counsellor. His conduct demonstrated an intention to rehabilitate himself. The offer from the accident employer did not come until seven months after the worker had moved. It was also not clear that the work as a security guard was suitable since no job description was sent to the Board.

The worker was entitled to full benefits from March 1988 to January 1989. The appeal was allowed. [6 pages]

WCAT Decisions Considered: Decision No. 539/89 (1989), 12 W.C.A.T.R. 208

DECISION NO. 216/90 (23/11/90) Hartman Drennan Nipshagen

Recurrences (compensable injury) - Continuity (of complaint).

The worker suffered a low back strain in May 1971 and received benefits until her return to work in June 1981. The worker appealed a decision of the Appeals Adjudicator denying entitlement for a lay-off in March 1982.

There was a lack of continuity of complaint from June 1981 to March 1982. Medical evidence did not support a recurrence or aggravation of the compensable injury or that the worker had not recovered from the compensable injury. The appeal was dismissed. [7 pages]

DECISION NO. 481/90 (23/11/90) Kenny Cook Seguin

Continuity (of treatment).

The worker suffered a whiplash injury in a compensable motor vehicle accident in December 1973 and received benefits until he returned to work in September 1974. The worker appealed a decision of the Hearings Officer denying further entitlement.

There was a 13 year gap in treatment from 1984 to 1987. The accident aggravated preexisting symptomatic cervical degenerative disc disease. The Panel found that the current symptoms were related to natural progression of the degenerative disc disease and not to the compensable accident. The appeal was dismissed. [6 pages]

DECISION NO. 850/90 (23/11/90) Starkman McCombie Meslin

Access to worker file, s. 77 (issue in dispute) (relevance).

The employer appealed a decision deleting certain items from the material released to the employer under s.77.

Invariably, there is contained within certain reports, a considerable amount of information which is not prima facie relevant to the issue in dispute but which is also not harmful, prejudicial or embarrassing. The Panel found that it was appropriate to grant access to such information. It may provide context to understand a particular report. In addition, although not obviously relevant now, it may become relevant in the context of the appeal or may be of assistance to the employer in preparing its case.

Applying this test, the Panel granted access to some of the material deleted by the Board. The appeal was allowed in part. [4 pages]

DECISION NO. 851/90 (23/11/90) Starkman McCombie Meslin

Access to worker file, s. 77.

Access to the worker's file was granted to the employer. [3 pages]

DECISION NO. 556/90I (26/11/90) Starkman Beattie Meslin

Rehabilitation, vocational (academic training) - Discretion, Board (rehabilitation) (standard of review) - Overpayment.

The employer appealed a decision of the Hearings Officer granting entitlement to sponsorship for a two-year course in the United States. In 1987, the Board sponsored the worker in a social work program at a community college. After graduation in 1989, the Board sponsored the worker for the course in the United States leading to a degree as an ordained minister. He is expected to complete this course in 1991.

The Board's policy allows for training which is essential to facilitate job placement in a suitable vocation. The Board's adjudicators are bound by the policy, which structures the discretion of the adjudicators. It is not open to the Board adjudicators to award benefits under s.54 to workers who do not meet the criteria specified by the Board, provided the policies are in accordance with the Act.

In this case, the Hearings Officer granted sponsorship for the training as a minister since, in his opinion, the worker could not have found employment as a social worker. The Panel found that the worker did not make a serious effort to find such work. He had formed the intention to become a minister as early as the early 1980s. Information from the community college indicated a placement rate of over 90%. The Panel concluded that it was premature to further sponsor the worker since it had not been shown that the worker would have been unable to find suitable employment as a social worker had he made a bona fide effort to do so over a reasonable period of time.

The appeal was allowed. The Panel noted that the worker had moved his family and had spent substantial monies on tuition, books and room and board. This money was spent in reliance on the Board's decision to sponsor him. The Panel would reconvene to hear representations regarding the Tribunal's equitable jurisdiction to continue the sponsorship or to make a direction not to recover the overpayment. [12 pages]

WCAT Decisions Considered: Decision No. 112 (1986), 3 W.C.A.T.R. 54; Decision No. 328/88

Board Directives and Guidelines: Vocational Rehabilitation Division Manual, Document nos. 02-01-03, 02-02-02

DECISION NO. 639/90L (26/11/90) Hartman Rao Barbeau

Leave to appeal (substantial new evidence) (medical report).

The worker applied for leave to appeal a decision of the Appeal Board denying entitlement beyond November 1979. The worker submitted new medical reports relating current arm problems to the compensable accident. The Panel found that the medical reports relied on the worker's account of the accident and did not refer to a non-compensable fall in 1987. Leave to appeal was denied. [6 pages]

DECISION NO. 200/90 (27/11/90) Onen Higson Nipshagen

Psychotraumatic disability - Apportionment (pensions) - Pensions (assessment) (psychotraumatic disability) - Intervening causes - Procedure (witness fees).

The worker suffered an injury at work in April 1977. In January 1978 she suffered a non-compensable accident while riding on a bus. As a result of a court action arising out of the bus accident, the worker obtained a judgment which found that she suffered from a psychological disability, that 40% of the disability could be attributed to the compensable accident and awarded damages in the amount of \$396,000.

The worker appealed the assessment of her pension at the 20% level and also the reduction of that pension by 50% on the basis that the subsequent bus accident contributed to her level of disability.

The worker suffered from anxiety and depression from time to time. However, these bouts of depression were not severe. The worker's primary restriction and complaint was pain. The worker's condition included social limitations, complaints of pain and depressive features, therefore Category 2 of the Board's guideline for psychiatric disabilities was applicable and the 20% rating was appropriate.

The worker was a vulnerable individual for whom the minor 1977 work accident resulted in a hysterical conversion reaction. There was evidence that the subsequent minor bus accident caused an increase in the worker's psychological disability. Given the worker's own position in the court proceedings and her claims to doctors, to the effect that the bus accident was the predominant cause of her problem, the Panel found that the bus accident was a significant factor in the development of the current disability. The bus accident was a subsequent intervening event which caused further injury to the worker and comprised one-half of the psychological disability from which she suffered. The appeal was dismissed.

The worker was denied reimbursement for expert testimony by a witness. The record contained several medical reports which formed the basis of the Panel's decision. The record also included several reports by the witness in question. [13 pages]

WCAT Decisions Considered: Decision No. 915 (1987), 7 W.C.A.T.R. 1; Decision No. 79/87 (1987), 6 W.C.A.T.R. 104
Board Directives and Guidelines: Claims Services Division Manual, s. 71(3), p. 209, Directive 23

DECISION NO. 280/90 (27/11/90) Hartman Cook Clarke
Woolrich v. Nella

Section 15 application - In the course of employment (lunch).

The plaintiff in a civil case applied to determine whether his right of action was taken away. The plaintiff was driving in company van on his unpaid lunch break at the time of a motor vehicle accident. He was proceeding from the employer's premises to a mall in order to pick up a photocopier for the employer and to have lunch. He would not usually go to this mall for lunch because it was too far to go during his half hour lunch break. The Panel found that the plaintiff was in the course of employment.

The defendant was a salesman whose job required him to travel. There was no indication that he was not in the course of employment.

The plaintiff's right of action was taken away. [10 pages]

WCAT Decisions Considered: Decision No. 547/87 (1988), 8 W.C.A.T.R. 160; Decision No. 571/88
Board Directives and Guidelines: Claims Services Division Manual, s.3(1), p.50, Directive 22

DECISION NO. 675/90L (27/11/90) Robeson McCombie Jago

Leave to appeal (substantial new evidence) (statements).

The worker applied for leave to appeal a decision of the Appeal Board denying temporary wage loss benefits from 1968 to 1977. The worker had suffered a compensable injury in 1977, returned to work in January 1968, was terminated in March 1968 and began new work immediately in March 1968.

The worker submitted statements from several co-workers that the worker was terminated because of inability to do the work. The Panel noted that some of these co-workers had given contradictory evidence

before the Appeal Board. In any event, the evidence did not address the issue of why the worker was unable to do his work. Leave to appeal was denied. [6 pages]

WCAT Decisions Considered: Decision No. 64 (1986), 2 W.C.A.T.R. 19

DECISION NO. 710/90 (27/11/90) Moore Beattie Ronson

Class of employer (logging) - Class of employer (woods operations) - Class of employer (road construction) - Class of employer (dual rates).

The employer appealed a decision of the Hearings Officer assessing it as a woods operations industry. The employer had two distinct operations - logging and road construction. Prior to 1986, it paid assessments on the basis of segregated payrolls. After an audit in 1986, the Board found that the road construction was to provide access to logging areas and that, therefore, the road construction operation should have been classified as a logging operation. The Hearings Officer relied on an agreement between the Board and the logging industry that sub-operations of the logging industry would be classified as logging operations.

The Hearings Officer confused the end product of the employer's road construction business with the end product of the business with whom the employer had contracted. The roads were built considerably in excess of standards required for typical logging roads. The employer had properly segregated its payroll. There was no justification for disturbing the dual assessment.

The employer had to be judged individually. Its status could not be determined merely on the basis of the agreement between the Board and the logging industry. [6 pages]

WCAT Decisions considered: Decision No. 423/88 (1988), 10 W.C.A.T.R. 216; Decision No. 93/90

Regulations Considered: Reg. 951 s.5, Schedule 1 class 1, Schedule 1 class 21

DECISION NO. 717/90 (27/11/90) Hartman Klym Preston

Recurrences (compensable injury).

The worker suffered a compensable elbow injury in July 1983 and returned to work in December 1983. In August 1984, the worker took four weeks of vacation. On his return, he was terminated for taking two more weeks of vacation that he was allowed. According to a collective agreement, the worker's employment had to be maintained while grievance procedures were pursued. The worker was given a different job. He laid off claiming a recurrence of his elbow disability.

On the evidence, the Panel found that a medical condition was not a factor in the worker's decision to leave employment. Rather, he was angry for being taken off his regular job and terminated. The appeal was dismissed. [7 pages]

DECISION NO. 792/90 (27/11/90) Strachan Lebert Chapman

Overpayment - Jurisdiction, Board (overpayment) - Jurisdiction, Tribunal (overpayment).

The worker sustained a wrist injury in March 1988. He received temporary total benefits until July 18, 1988 and from that date until August 8, 1988 he was paid full temporary partial disability benefits.

Based on a letter from the worker's orthopaedic surgeon, which stated that the worker's complaints had settled completely and authorized his return to regular work, the Panel found that the worker was not totally

or partially disabled after July 18. Accordingly, the worker was not entitled to any benefits after that date and the issue became whether the worker's case merited the writing off of the resulting overpayment.

Despite the silence of the Act on the point, the Board had the authority to collect overpayments. The Act, particularly s.89, imposed a duty on the Board, analogous to that of a trustee of pension funds, which fixed it with the responsibility of maintaining a financially viable and fiscally responsible fund. Implicit in the authority accompanying that duty is the authority to collect or waive overpayments.

A Board decision in respect of overpayment issues is not primarily administrative. The Board's practice is to treat them as part of the general appeal system that can lead to a Hearings Officer decision. The Board had developed a policy to guide its adjudicators in the exercise of their discretion in overpayment cases. The Tribunal thus had a parallel jurisdiction under s. 86g(3).

In this case, there was nothing to justify a waiver of the overpayment. In July 1988 the worker's plant was on lay-off, but he was entitled to receive unemployment insurance benefits. He did not apply for such benefits until September 1988. The worker's testimony indicated that he was aware that entitlement to compensation benefits would cease upon his being found fit for regular employment and that he was entitled to unemployment insurance benefits.

The worker did not advise his rehabilitation counsellor of the contents of the orthopaedic surgeon's letter. The worker exacerbated the situation by deliberately cashing compensation benefit cheques after being advised by a Board employee not to do so. The worker's appeal was dismissed. [9 pages]

WCAT Decisions Considered: Decision No. 918/87 (1988), 8 W.C.A.T.R. 197; Decision No. 373/90

Cases Considered: S & M Laboratories Ltd. v. Ontario (1979), 24 O.R. (2d) 732 (Ont. C.A.)

DECISION NO. 803/90 (27/11/90) Marafioti Lebert Nipshagen

Access to worker file, s. 77.

Access to the worker's file was granted to the employer. [3 pages]

DECISION NO. 837/90 (27/11/90) Faubert Higson Apsey

Access to worker file, s. 77 (conditions of access).

Access to the worker's file was granted to the employer, except for two reports which were not relevant. The Panel refused to impose conditions limiting the employer's access to viewing the documents at the Board's premises since there was no evidence that the employer had previously acted improperly in its use of information concerning the worker. [5 pages]

WCAT Decisions Considered: 826/88, 530/89

DECISION NO. 846/90 (27/11/90) Starkman Cook Preston

Health care (dental aid).

The worker suffered a compensable accident in which she fell, striking her face. The worker underwent root canals in two lower teeth. This dental work was recognized as compensable by the Board. Six months later the worker had dental problems with same upper teeth. The worker appealed a decision of the Hearings Officer denying entitlement for the upper teeth.

It was not established that the worker injured her upper teeth in the compensable accident. On the balance of probabilities, the ongoing problems were a continuation of dental conditions which pre-dated the accident. The appeal was dismissed. [7 pages]

DECISION NO. 315/89 (28/11/90) Starkman Cook Nipshagen

Consequences of injury (iatrogenic illness) (medication) (diazepam) - Consequences of injury (iatrogenic illness) (medication) (anxiolytic amnesic disorder) - Drug abuse - Psychotraumatic disability.

The worker appealed a decision of the Appeals Adjudicator denying continuing benefits. The worker suffered a compensable accident in December 1979. The Board discontinued benefits in May 1981. The worker suffered a number of other compensable and non-compensable accidents both before and after the 1979 accident.

Prior to the 1979 accident, the worker experienced dizziness and headaches but was able to work intermittently. After the 1979 accident the worker began to suffer loss of memory and was unable to return to work.

The worker's condition was caused by excessive use of Diazepam. He began taking this drug due to the injuries prior to the 1979 accident. However, the 1979 accident was also a significant contributing factor to the increased use and development of a dependency on the drug. His condition was not accurately diagnosed until 1989, when the worker took himself off the drug and his condition improved.

The Panel found that the worker's condition was an organic mental disorder known as anxiolytic amnesic disorder. This was an iatrogenic illness related to the compensable and non-compensable accidents. The worker was totally disabled and entitled to benefits until 1989. The appeal was allowed. [20 pages]

WCAT Decisions Considered: Decision No. 439/87 (1987), 8 W.C.A.T.R. 147; Decision Nos. 157M, 361/87

DECISION NO. 321/90 (28/11/90) Hartman Drennan Nipshagen
Singh v. Arruda

Section 15 application.

The defendants in a civil action applied to determine whether the plaintiff's right of action was taken away. The plaintiff and the defendant driver were in the course of employment at the time of a motor vehicle accident. The plaintiff's right of action was taken away against the defendant driver but not against the corporate defendant which leased the vehicle to the employer of the defendant driver. [7 pages]

DECISION NO. 635/90L (28/11/90) Starkman Beattie Preston

Leave to appeal (substantial new evidence) (witness).

The worker applied for leave to appeal a decision of the Appeal Board denying entitlement for a back condition in 1967 which the worker related to three minor compensable accidents in 1951, 1952 and 1953.

Two witnesses did not provide substantial new evidence since they provided only further evidence to be considered with the evidence of co-workers and supervisors that was before the Appeal Board. There was evidence to support the Appeal Board conclusion. Leave to appeal was denied. [6 pages]

DECISION NO. 645/90 (28/11/90) McGrath Rao Meslin

Access to worker file, s. 77.

Access to the worker's file was granted to the employer. [4 pages]

DECISION NO. 646/90 (28/11/90) McGrath Rao Meslin

Access to worker file, s. 77.

Access to the worker's file was granted to the employer. [3 pages]

DECISION NO. 651/90 (28/11/90) Hartman Drennan Nipshagen

Delay (onset of symptoms).

The worker suffered a heel and back injury in a fall. The worker appealed a decision of the Hearings Officer denying entitlement for a bilateral knee disability.

The worker was not a credible witness. The Panel did not accept his description of the accident, particular the distance that he fell, or the impact of the fall on his knees. The Panel found that the worker did not suffer a knee injury in the accident. Even if a Baker's cyst on his knee was related to the accident, it was not disabling. The appeal was dismissed. [7 pages]

DECISION NO. 789/90I (28/11/90) Bradbury Beattie Meslin

Board Directives and Guidelines (tinnitus) - Hearing loss - Tinnitus - Delay (reporting injury).

The worker appealed a decision of the Hearings Officer denying entitlement for hearing loss, tinnitus and a low back disability. The worker worked as a miner for about 18 years, including about 10 years as a jackleg and stopper driller.

The worker did not report the back injury until one year after he stopped working as a miner. He had performed essentially the same work for 10 years without problem. The slight degenerative changes in the worker's back were likely attributable to the natural ageing process. The worker was not entitled to benefits for the back condition.

The worker had hearing loss of 25 decibels in one ear and 15 decibels in the other ear. This did not meet the requirements of the Board policy of 25 decibel loss in each ear.

Medical reports indicated that the worker was bothered by tinnitus. The Board denied entitlement on the basis of its policy which requires an accepted claim for hearing loss in order to be entitled to benefits for tinnitus. The Panel requested additional evidence, medical examinations and submissions as to the Board policy regarding hearing loss and tinnitus. The hearing would then reconvene. [7 pages]

DECISION NO. 790/90 (28/11/90) Bradbury Beattie Meslin*Commutation (pressing need).*

The worker appealed a decision of the Hearings Officer denying commutation of the worker's pension. One of the worker's children was suffering from Hurler's syndrome, a progressive and ultimately fatal condition. The worker wanted the commutation to provide for his daughter's care, specifically a special bed, a special wheelchair and surgical procedures including an operation which can only be carried out in the United States.

The case did not come within the Board policy for commutations under s.26(1). The Panel then considered the application of s.26(4), which provides that the Board may grant a commutation if the interest or pressing need of the worker or dependant warrants it.

The Panel was concerned with a number of matters. The worker had mistakenly believed that a bone marrow transplant would have to be performed in the United States whereas in fact the operation was performed in Toronto. The worker provided no documentation to establish that the future operation could not be carried out in Canada. The worker had not canvassed alternate sources for obtaining the bed and wheelchair. The worker's compensable condition was deteriorating and had two other children who would continue to require his support and assistance.

The commutation could not be granted because of the daughter's pressing need since she was not a dependant within the definition in s.1(1)(f), which has been interpreted to refer to a deceased worker's surviving dependants.

The Panel was not satisfied that the daughter's condition constituted a pressing need for the worker because of the above concerns.

The appeal was dismissed. [7 pages]

WCAT Decisions Considered: 1008/89

Board Directives and Guidelines: Guidelines for the Commutation of Pensions, Board Minute 3, March 20, 1989, p.71

DECISION NO. 852/90 (28/11/90) Stewart Cook Meslin*Pensions (lump sum) (ten per cent pension).*

The worker appealed a decision of the Hearings Officer denying commutation of his pension. Since the pension was for 8%, the appeal was considered under s.45(4).

It was not established that the payment of the pension as a lump sum would not be to the advantage of the worker. It would allow him to pay off debts and purchase tools that he needed to obtain a job in his trade. A further period of unemployment would only diminish his chances of vocational rehabilitation. The appeal was allowed. [6 pages]

WCAT Decisions Considered: Decision No.16 (1986), 1 W.C.A.T.R. 62; Decision No. 693

Board Directives and Guidelines: Commutation of Pensions Policy, Board Minute 4, April 3, 1987, p.5186

DECISION NO. 867/90 (28/11/90) Starkman Lebert Meslin*Continuing entitlement.*

The worker suffered a back and shoulder injury in July 1985. The worker appealed a decision of the Hearings Officer denying benefits from February 4, 1986, to February 24, 1986. Although discharged from HRC, the worker went to her own doctor who said she could return to work on February 24. The Panel found that

the worker had not recovered by February 4 and that she was entitled to benefits until February 24. The appeal was allowed. [5 pages]

DECISION NO. 23/90R (29/11/90) Hartman McCombie Clarke

Reconsideration.

The applicant's request to reconsider Decision No. 23/90 was denied. [4 pages]

WCAT Decisions Considered: Decision No. 95R (1989), 11 W.C.A.T.R. 1; Decision Nos. 72R, 72R2, 23/90
Board Directives and Guidelines: Claims Adjudication Branch Procedures Manual, Document no. 33-27-01

DECISION NO. 110/90R (29/11/90) Signoroni McCombie Shuel

Reconsideration.

The worker's request to reconsider Decision No. 110/90 was denied. One of the grounds for the request was that the Panel failed to get further evidence. The Panel noted that a panel will decide an appeal if it has enough evidence. It will only seek further evidence or clarification if there are critical gaps in the evidence. [4 pages]

WCAT Decisions Considered: Decision No. 95R (1989), 11 W.C.A.T.R. 1; Decision Nos. 72R, 72R2, 23/90

DECISION NO. 118/90 (29/11/90) Signoroni McCombie Clarke

Accident (occurrence).

The worker appealed a decision of the Hearings Officer denying entitlement for a left knee disability. On the evidence, the knee disability was related to a previous serious non-compensable motor vehicle accident. Work was not a significant contributing factor. The appeal was dismissed. [8 pages]

DECISION NO. 229/90 (29/11/90) Bigras Beattie Barbeau

Psychotraumatic disability - Chronic pain - Intervening causes - Disability (disabled from working) - Continuing entitlement.

The worker suffered neck, left arm, left shoulder and right knee injuries in a compensable motor vehicle accident in 1983. The worker appealed a decision of the Hearings Officer denying entitlement for organic and non-organic disabilities subsequent to December 1984.

On the evidence, the worker had recovered from the organic conditions resulting from the accident by December 1984.

The worker was not entitled to benefits for psychotraumatic disability. There was a period of anxiety after the accident but the worker recovered from this prior to December 1984. She was admitted to hospital in 1987 suffering from deep reactive psychosis. However, this was related to serious family problems and alcohol.

The worker was not entitled to benefits for chronic pain. In 1988, the worker complained of pain which extended beyond the parts of the body injured in the accident. Since the worker's pain was diagnosed as being organic, rather than psychogenic, in origin, the Panel was of the view that pain related to the accident would not appear suddenly in other parts of the body. In addition, there were intervening causes which broke the chain of causation, such as numerous other non-compensable disabilities that developed in the mid-1980s, a serious alcohol problem and family problems. Further, the complaints of pain were not continuous, did not cause a significant alteration of her lifestyle and did not disable the worker from working. When the worker was disabled from working, it was for reasons unrelated to the pain.

The appeal was dismissed. [15 pages]

WCAT Decisions Considered: Decision No. 915 (1987), 7 W.C.A.T.R. 1; Decision No. 638/89I (1989), 12 W.C.A.T.R. 222; Decision No. 693/89I (1989), 12 W.C.A.T.R. 236; Decision No. 229/90I

DECISION NO. 754/90 (29/11/90) McGrath Cook Shuel

Continuity (of treatment).

The worker strained his back in December 1978. He did not lose time from work. The Board granted benefits for one medical treatment. The worker appealed a decision of the Hearings Officer denying benefits for a herniated disc in 1982.

There was a lack of continuity of treatment and complaint. The appeal was dismissed. [6 pages]

DECISION NO. 805/90 (29/11/90) McGrath Lebert Barbeau

Subsequent incidents (outside work).

The worker strained his ankle in a compensable accident in February 1988. He returned to work two weeks later. In May 1988, the worker suffered a further sprain at home while walking down steps. The worker appealed a decision of the Hearings Officer denying entitlement for the incident at home.

The Panel found that the worker continued to experience problems with his ankle on his return to work. The minor misstep on the stairs at home would have been insignificant if not for the fact that the worker had an unhealed ankle injury. The compensable accident was a significant contributing factor to the incident at home. The incident at home aggravated the compensable condition. The appeal was allowed. [6 pages]

DECISION NO. 817/90 (29/11/90) Strachan Cook Apsey

Supplements, temporary - Availability for employment (disabled by non-compensable condition).

The worker appealed a decision of the Hearings Officer denying entitlement to a temporary supplement to his 1% pension from August 21, 1987, to December 4, 1987. The worker was engaged in a job search during this period, except from September 29 to November 6 when he was disabled by a non-compensable condition. The worker confirmed that he was not seeking the supplement for the time he was disabled by the non-compensable condition. He was entitled to the supplement from August 21 to September 28 and from November 6 to December 4. [6 pages]

DECISION NO. 839/90 (29/11/90) Faubert Higson Apsey

Access to worker file, s.77 - Jurisdiction, Tribunal (section 77) - Jurisdiction, Tribunal (final decision of Board).

The worker appealed a decision of the Access Specialist granting the employer access to the worker's file.

The worker submitted that the Tribunal did not have jurisdiction since s.77(6) did not state specifically that a party could appeal to the Tribunal. The Panel found that the section was sufficiently specific to conclude that such appeals are matters which have been conferred expressly upon the Tribunal pursuant to s.86g(1)(a).

Even if the Panel was wrong in this conclusion, the decision of the Board was a decision under s.86g(1)(b) regarding entitlement to benefits since the right of an employer under s.77 must be seen as a condition of entitlement to compensation. According to the procedure set by the Board, there was no further right of appeal at the Board. Therefore, the Tribunal had jurisdiction under s.86g(2).

Access to the worker's file was granted to the employer, except for some specific personal information which was not relevant. [7 pages]

WCAT Decisions Considered: Decision No. 696/88 (1989), 10 W.C.A.T.R. 308

DECISION NO. 841/90 (29/11/90) McIntosh-Janis Drennan Preston

Rehabilitation, vocational (maintenance allowance) - Rehabilitation, vocational (academic training).

The worker appealed a decision of the Hearings Officer denying further entitlement to a maintenance allowance and denying entitlement for tuition fees.

The worker suffered a compensable accident in 1984. In February 1987, he began a program to upgrade his education from grade 10 level to grade 12. The Board stopped funding this upgrading when it became concerned whether the worker was making progress in the course. It appeared to the Hearings Officer that it would take at least three and one-half years to complete a two year program. By the time of the hearing at the Tribunal it appeared it would take even longer. The Panel found that there was no obligation to continue funding the program.

The worker was not entitled to payment of tuition fees for a computer programming course. Testing indicated that the worker did not have an aptitude in that field or the physical ability to complete the course. In addition, it appeared that there were jobs the worker could perform without additional training.

The appeal was dismissed. [7 pages]

DECISION NO. 405/88R (29/11/90) Kenny McCombie Apsey

Reconsideration (procedural error) (notice) - Natural justice (procedural error) (full and fair hearing) - Issue setting.

The worker requested a reconsideration of Decision No. 405/88. The worker fell while at work in September 1984. The Board granted the worker entitlement for right elbow surgery, but denied entitlement for subsequent left elbow surgery. The Hearings Officer decided that the left elbow disability did not result from the fall. He thus did not have to determine whether the September 1984 accident was compensable.

The Hearing Panel found that the September 1984 fall was an injury by accident and that the worker was in the course of employment when he fell, but concluded that the accident did not arise out of employment. It was not clear to the Reconsideration Panel whether the Hearing Panel concluded that: 1) the left elbow disability was caused by the fall but the fall was not compensable, or 2) the left elbow disability was caused by chronic alcoholism rather than the fall (in which case it was not necessary to decide whether the accident was compensable).

The "Issue on Appeal", as stated in the Case Description prepared by the Tribunal Counsel Office, was whether the worker's left elbow disability was causally related to the September 1984 compensable accident. It thus assumed that the accident was compensable. The worker argued, before the Reconsideration Panel, that the Hearing Panel improperly denied his appeal because it found that the September 1984 accident was not compensable, even though the compensability of that accident had never been in question before the Board and though the Hearing Panel had never informed the worker that this was an issue.

Hearing panels must determine the issues to be dealt with and they are free to expand the issue from that set out in the Case Description. The Hearing Panel thus was entitled to consider the broader issue of initial entitlement, i.e., whether the September 1984 accident arose out of the employment. However, it was important that this be done in consultation with the participating parties, especially since a finding that the accident was not compensable potentially affected benefits which had already been paid.

The failure to ensure that the worker understood that the compensability of the accident was going to be an issue, was a procedural error which meant that the worker did not have a full and fair hearing. Additional evidence or argument might have been presented on the worker's behalf had it been known that compensability was an issue.

The worker should be placed in the same position as he would have been in if he had been given full notice of the compensability issue. Decision No. 405/88 was revoked, leaving the Hearings Officer's decision as the one in effect. The worker could decide whether he still wished to appeal that decision. [8 pages]

WCAT Decisions Considered: Interim Decision No. 24 (1986), 1 W.C.A.T.R. 93; Decision No. 638/89I (1989), 12 W.C.A.T.R. 236; Decision No. 405/88; Pension Assessment Appeals Leading Case Interim Report (1986), 7 W.C.A.T.R. 365

DECISION NO. 109/89I2 (29/11/90) McIntosh-Janis Lebert Nipshagen

Adjournment (consolidation of hearings).

The hearing (which had been reconvened to determine the possible retroactive entitlement of the worker to his pension for hearing loss, beyond the date of the amended Board policy pursuant to which the pension was granted) was adjourned as the matter was to be heard at the same time as the hearing of another worker whose file raised the same issue. [3 pages]

WCAT Decisions Considered: Decision Nos. 109/89, 434/89, 434/89I2

DECISION NO. 434/89I2 (29/11/90) McIntosh-Janis Lebert Nipshagen*Intervenors (access to Case Description).*

The worker had been granted a pension for hearing loss pursuant to an amended board policy. The Board was ordered to pay benefits from the date of the amended policy in 1988. A further hearing was convened to determine the possible retroactivity of the pension award. The file of another worker whose case involved the same issue was consolidated with this worker's file.

Two representatives of the Office of the Worker Adviser had been invited to participate as intervenors in the hearing of the retroactivity issue. They requested access to the Case Descriptions involving the claims of the workers which gave rise to this hearing. They also requested that further intervenors be allowed to make submissions on this general issue which was of substantial interest to both the employer and worker communities.

The intervenors were not entitled to access to the Case Descriptions. The possible retroactivity of the pension award was a discrete issue which did not require disclosure of the workers' medical files to the intervenors.

The broader participation of intervenors was appropriate in this case. The Panel would decide which intervenors could participate from short lists to be submitted by the parties and the Office of the Employer Adviser. The Panel set out a schedule for the steps to be taken and procedures to be followed in preparation for the actual hearing, including, a peremptory date for the discussion of any further preliminary issues and deadlines for the filing of written outlines of submissions to be made at the oral hearing. [5 pages]

WCAT Decisions Considered: Decision Nos. 109/89I, 109/89, 434/89I, 434/89; Pension Assessment Appeals Leading Case Interim Report (1986), 7 W.C.A.T.R. 365

DECISION NO. 437/89R (29/11/90) Bigras McCombie Apsey*Reconsideration (consideration of evidence) - Procedure (reconsideration) - Investigation by Tribunal.*

The worker requested the reconsideration of Decision No. 437/89 which denied him entitlement to further temporary benefits for organic and psychotraumatic disability after May 1986. The worker had injured his lower back in March 1984 and received temporary total benefits until May 1986. He was awarded a 10% provisional pension for psychotraumatic disability for the two-year period from May 1986 to May 1988.

The failure of Decision No. 437/89 to mention the evidence of an expert in neurosurgery who testified at the hearing constituted good reason to re-open the decision. He had treated the worker for three years and his testimony interpreted the evidence of his colleagues and the radiological examinations undertaken by the worker. It is a principle of administrative law that, in written decisions, reasons should be given for refusing to accept relevant and significant testimony given under oath.

The Hearing Panel seemed to have inferred that the lack of psychiatric reports indicating continued psychiatric disability since 1986 meant that no such problem existed. Such an inference was unreasonable. Elementary justice required that evidence show that there was no disability. It is the duty of panels who are faced with an evidentiary deficiency to exercise their investigative power where there appears to be a reasonable prospect of obtaining relevant evidence in order to ensure reaching the correct decision.

The file also indicated that the worker may have had a claim for chronic pain disorder. Adjudication of such a claim would require a review of the same evidence reviewed by the Hearing Panel.

The Reconsideration Panel directed that Decision No. 437/89 be revoked and reheard. It also directed the Tribunal Counsel Office to obtain submissions from the parties on procedural issues relating to: whether the

rehearing could proceed by way of written submissions and a review of transcripts rather than a rehearing of the evidence; the scope of the issue agenda for the rehearing. [6 pages]

WCAT Decisions Considered: Decision No. 95R (1989), 11 W.C.A.T.R. 1; Decision No. 850/87R (1990), 14 W.C.A.T.R. 1; Decision Nos. 72R, 72R2, 437/89
Practice Directions Considered: Practice Direction No. 8 (1987), 1 W.C.A.T.R. 233

DECISION NO. 112/90 (29/11/90) Signoroni Fox Nipshagen

Credibility - Continuing entitlement.

In February 1987 the worker fell and slid 10 to 15 feet down a snowy hill, injuring his left knee. He had previous left knee symptoms. Arthroscopy of the left knee performed in July 1987 had already been scheduled in December 1986. The worker received benefits on an aggravation basis until July 1987. The Hearings Officer found that the worker underestimated the nature of the preexisting condition and maximized the severity of the accident. On that basis, the Hearings Officer questioned the worker's credibility and denied him continuing benefits.

There was no evidence to suggest that the worker's evidence was unreliable or unpersuasive. One Board medical report, which was relied upon by the Hearings Officer, acknowledged the difficulty of accurately identifying the date when the acute phase of the aggravation of the preexisting condition caused by the work injury ended. The opinion of the treating specialist was that despite the mild preexisting degenerative condition, the work accident caused a significant soft tissue injury and perhaps articular cartilage injury.

The worker's injury had not reverted to its pre-accident state at any time prior to March 1988, when he underwent further surgery to the left knee. The worker was entitled to total benefits until that time. The issue of entitlement to benefits beyond that date was referred back to the Board. [7 pages]

DECISION NO. 17/88 (30/11/90) Kenny Robillard Meslin

Stroke - Presumptions (section 3) (standard of proof) - Benefit of the doubt - Consequences of injury (iatrogenic illness) (treatment) (chiropractic manipulation).

The worker appealed a decision of the Appeals Adjudicator denying entitlement for a stroke. The worker fell at work in December 1982, striking his head. His briefcase landed on his stomach. His spleen had to be removed. The worker continued to have pain in his shoulder and neck as well as headaches. He had chiropractic treatment twice a week from February 1983 to November 1983. He returned to work after the appointment on November 3 and suffered the stroke.

There were a number of theories to explain the stroke: 1) a spontaneous, non-work-related haemorrhage of the worker's preexisting arteriovenous malformation (AVM); 2) an infarction (death of part of the brain due to lack of blood supply) caused by a blood clot which resulted from an injury to an artery during the chiropractic treatment; 3) haemorrhage related to the AVM combined with raised blood pressure from strain from the chiropractic manipulation or work; 4) increased coagulability of the blood after removal of the worker's spleen; 5) direct result of the 1982 accident.

Based on the medical evidence, the Panel found that the stroke probably resulted from a haemorrhage, although there was enough credible evidence suggesting that it resulted from infarct for the Panel to have some doubt. There was very low probability that the haemorrhage resulted from the 1982 head injury. It was more likely that the haemorrhage was spontaneous than that it resulted from increased blood pressure, although there was some evidence of exertion.

The Panel was unable to say that any of the various theories of causation was the probable cause of the

stroke. At best, the Panel could rank the probabilities. The probability of spontaneous haemorrhage was slightly greater than of work/treatment related haemorrhage but the evidence in favour of both these theories was substantial. The theory of in fact was less substantial but was sufficient to present some credible doubt on the haemorrhage theories. The direct relationship to the accident was the least probable theory.

Since the accident occurred in the course of employment, the presumption was applicable. However, the presumption should not be used as a substitute for careful investigation and consideration of the evidence. The evidence for and against a work relationship was approximately equal. The Panel applied the benefit of doubt and found that the worker was entitled to benefits for the stroke.

Applying the presumption, the worker would also be entitled to benefits. Generally, Tribunal decisions have applied the civil standard of proof to rebut the presumption but more convincing evidence of non-work-relatedness is required than in the absence of the presumption. This was similar to the "sliding scale" used in certain court decisions which requires differing degrees of proof depending on the gravity of the issue. The Panel found that, to rebut the presumption, the wording of s.3(3) requires that it is probable that the accident did not arise out of employment. It is not sufficient that a theory of non-work-relatedness is the best of a number of possible theories.

In this case, the evidence supporting the theories which were work/treatment related was sufficiently strong that the Panel was not persuaded that it was probable the stroke resulted from a spontaneous haemorrhage. Therefore, the presumption was not rebutted.

The appeal was allowed. [21 pages]

WCAT Decisions Considered: Decision No. 24F (1990), 13 W.C.A.T.R. 1; Decision No. 244 (1987), 6 W.C.A.T.R. 18; Decision No. 88/87 (1988), 8 W.C.A.T.R. 93; Decision No. 371/87 (1988), 9 W.C.A.T.R. 81; Decision No. 107/88 (1988), 8 W.C.A.T.R. 318; Decision No. 42/89 (1989), 12 W.C.A.T.R. 85; Decision No. 224/90 (1990), 14 W.C.A.T.R. 310

Cases Considered: Kuntz v. WCB (1985), 51 O.R. (2d) 728 (Div.Ct.) rev'd 31 D.L.R. (4th) 630 (C.A.)

DECISION NO. 566/90 (30/11/90) McIntosh-Janis Klym Nipshagen

Overpayment - Commutation (debt liquidation) (overpayment) - Commutation (reversibility).

The worker received benefits from the Board for a period of time due to an error on the part of the Board. The Board collected the overpayment by withholding one benefit payment and by partially commuting the worker's pension. The worker appealed the decision of the Board regarding the method of reducing the overpayment.

The Tribunal had jurisdiction regarding overpayments. The standard of review of the Board's decision is the same as for other appeals, i.e., to examine whether the Board's opinion was correctly formed and whether the Panel is of the same opinion.

It was not necessary to consider the Board's power to recover overpayments. The purpose of a pension is to provide a steady income to the worker. Commutations are granted only when stringent requirements are met and the worker can establish a long term rehabilitative potential. Commutations should not be done for Board convenience or need.

Older Board guidelines contemplate the possibility of commutation for reimbursement of an overpayment. However, in this case, the Board did not appear to consider the financial impact on the worker or other possible methods of repayment.

The Board's methods of recovering the overpayment were improper in this case. To correct this, the Panel reversed the commutation and restored the pension to its full uncommuted value. The Board could put forward new proposals to recover the overpayment in accordance with its guidelines. The appeal was allowed in part. [11 pages]

WCAT Decisions Considered: Decision No. 112 (1986), 3 W.C.A.T.R. 54; Decision No. 202 (1986), 3 W.C.A.T.R. 117; Decision No. 918/87 (1988), 8 W.C.A.T.R. 197; Decision No. 827/89 (1990), 13 W.C.A.T.R. 243; Decision Nos. 831, 1180/87, 373/90 Board Directives and Guidelines: Operational Policy Manual, Document no. 05-01-09; Guidelines for the Commutation of Pensions, Board Minute 3, March 20, 1989, p.71

DECISION NO. 600/90 (30/11/90) Bigras Beattie Jago

Temporary disability (beyond pension level) - Disability (disabled from working) - Pensions (arrears) - Pensions (stacking) - Chronic pain - Psychotraumatic disability.

The worker suffered compensable back injuries in January 1970 and May 1975. In March 1976, he was awarded a 20% pension retroactive to July 1973. In December 1978, it was increased to 25%. In August 1988, it was raised to 30% retroactive to December 1987. The worker received temporary benefits for various periods over the years. The worker appealed denial of temporary benefits for other periods, denial of benefits for an ulcer and denial of benefits for chronic pain or psychotraumatic disability.

The worker was not entitled to further temporary benefits. He was either not disabled from working or not disabled beyond his pension level. At times, he was also not cooperating with rehabilitation.

The Board accepted the ulcer as compensable as a consequence of medication for the back condition. However, the worker was not disabled from working.

The worker was not entitled to the 30% pension earlier than awarded. Evidence indicated a deterioration of his condition at that time. He was not entitled to a higher pension, as pain radiating into his leg was considered.

The worker was not entitled to a pension for chronic pain. The pain was not inconsistent with organic findings. Further, he was already receiving a 30% pension, the maximum for his back disability.

The worker was not entitled to benefits for psychotraumatic disability. Prior to 1988 he developed a deep obsession to obtain compensation benefits but did not have a psychiatric disability. After 1988, he developed a psychiatric disability but it was not related to the compensable accident.

The appeal was dismissed. The Board was directed to consider entitlement for one period of hospitalization in 1988. [24 pages]

WCAT Decisions Considered: Decision No. 915 (1987), 7 W.C.A.T.R. 1; Decision No. 15/90 (1990), 13 W.C.A.T.R. 320
Board Directives and Guidelines: Operational Policy Manual, Document no. 03-03-03

DECISION NO. 678/90 (30/11/90) Kenny Ferrari Preston

Arising out of employment (fighting).

The worker appealed a decision of the Hearings Officer denying entitlement for an altercation. The worker was confronted by a co-worker. A heated conversation was followed by pushing. The worker fell to the ground and was injured. The Hearings Officer denied entitlement on the grounds that the altercation was related to a personal matter.

The altercation related to the co-worker's ability to speak English. The co-worker was concerned with possible complaints about her job performance due to inability to communicate with co-workers. The Panel found that the altercation arose out of employment. The appeal was allowed. [6 pages]

WCAT Decisions Considered: 678/90

DECISION NO. 680/90 (30/11/90) McGrath Lebert Preston

Jurisdiction, Tribunal (section 77) - Procedure (section 77) (no appeal by employer) - Time limits (section 77) - Issue setting (section 77) - Downside risk.

The worker appealed a decision of the Board, which denied access to certain portions of some documents and granted access to the remainder of the worker's file. The employer did not appeal but submitted that the worker's appeal opened the entire decision to review.

Generally, the Tribunal has adopted a broad interpretation of its jurisdiction. However, on a s.77 appeal, the Tribunal should take a narrow view of its jurisdiction. There is no difficulty in establishing the issues decided by the Board. The documents in dispute are specified in the Board's access decision.

Section 77(6) makes it clear that both employers and workers have an opportunity to appeal and that the 21 day limitation period applied to both parties. The Legislature intended to allow only timely appeals.

The Panel also noted that allowing employers to raise new issues without having made a timely cross-appeal would prejudice workers who would not receive adequate notice and would lose control of the proceedings. There could be a strong disincentive to appeal.

The Panel adopted the narrow interpretation of its jurisdiction and considered only the specific appeal of the worker.

The documents identified by the Board were relevant to the issue in dispute. The appeal was dismissed. [8 pages]

WCAT Decisions Considered: Pension Assessment Appeals Leading Case Interim Report (1986), 7 W.C.A.T.R. 365; Decision No. 756 (1988), 8 W.C.A.T.R. 64; Decision Nos. 383, 405, 411

DECISION NO. 869/90 (30/11/90) Starkman Lebert Jago
Universal Cleaning Ltd. v. Cellupica

Section 15 application - In the course of employment (proceeding to and from work) - Adjournment (representative availability).

The defendants in a civil action applied to determine whether the plaintiff's right of action was taken away.

In a preliminary matter the Panel refused an adjournment request. The plaintiff's solicitor did not appear at the hearing. After the Tribunal contacted his office, another solicitor from his office appeared and requested the adjournment on the grounds that the original solicitor's car had broken down. The Panel was of the view that the solicitor could have taken other means of transportation to arrive at the hearing, even if he would have been late.

The worker was a cleaner who worked a late shift that finished in the early hours of the morning. She was injured in a motor vehicle accident while returning home after her shift with a co-worker. Transportation home at that hour was a concern to the worker at the time she started this job. To attract and maintain workers on this shift, it was necessary for the employer to arrange transportation home. As such, transportation was an integral part of the employment contract.

The plaintiff was in the course of employment. Her right of action was taken away. [8 pages]

Board Directives and Guidelines: Claims Services Division Manual, s.3(1), p.41, Directive 1; s.3(1), p.50, Directive 22

DECISION NO. 173/89A (04/12/90) Moore Fuhrman Seguin*Commutation (debt liquidation).*

The Panel reheard the worker's appeal from a decision denying a commutation of his pension. The worker wanted a partial commutation of his pension for the purpose of paying off outstanding debts. The commutation would alleviate some of the effects of the worker's disability by eliminating a debt load that was emotionally stressful and financially onerous. It would also enhance his prospect for successful vocational rehabilitation.

The appeal was allowed. A partial commutation was granted with the proceeds to be paid to a trust fund to be used to pay the worker's creditors. [7 pages]

WCAT Decisions Considered: Decision Nos. 173/89, 173/89R, 173/89R2

DECISION NO. 282/90 (04/12/90) Moore Higson Seguin*Election - Action (settlement) - Subrogation - Jurisdiction, Tribunal (refusal to refer to Hearings Officer).*

The worker was injured in a motor vehicle accident. The employer told the worker he was not entitled to workers' compensation benefits. The worker commenced an action against the other driver and accepted a settlement. Three years after the accident the worker found out that he was entitled to workers' compensation benefits. The Review Services Branch denied benefits since the settlement was not approved by the Board, in accordance with s. 8(2) and (3).

The Panel found that it had jurisdiction. The Board would not refer the matter to a Hearings Officer. Therefore, there was a final decision of the Board.

The provisions of the s. 8 election are designed to balance the interests of the worker on the one hand and employers, as represented by the Board. Section 8 creates a procedure that attempts to ensure communication between the worker and the Board where third party litigation is contemplated. It imposes an explicit obligation on the worker to inform the Board at various stages of the process. Balancing this obligation, there is an implied obligation that the Board ensure that a worker be reasonably informed as well.

The purpose of s. 8(3) is to protect the equitable right of subrogation conferred on the Board or an employer by s. 8(4). Therefore, s. 8(3) should be applied in a manner that is consistent with the general purpose of s. 8. Among the criteria that should be considered in determining whether to approve a settlement is the issue of whether the settlement entered into by the worker was an "informed" settlement. This interpretation required the addition of the word "informed" before the word "settlement" in s. 8(3). This addition filled a gap and reconciled s. 8 (3) with the other portions of s. 8.

In this case, the worker elected to sue under the mistaken impression that he had no other option. There was no informed settlement. It would, therefore, be unjust to deprive the worker of benefits under s. 8(2). The appeal was allowed. [9 pages]

WCAT Decisions Considered: Decision No. 51 (1987), 4 W.C.A.T.R. 67; Decision No. 1123/87 (1988), 8 W.C.A.T.R. 274

Cases Considered: Lewis v. Low (1984), 45 O.R. 92d 436 (C.A.); Minister of Transport for Ontario v. Phoenix Assurance Co. Ltd. (1973), 1 O.R. (2d) 113 (C.A.); WCB v. Theed, [1940] 3 D.L.R. 561 (S.C.C.)

DECISION NO. 534/90I (04/12/90) Ellis Cook Apsey

Charter of Rights (court of competent jurisdiction) - Jurisdiction, constitutional (obligation to consider constitutional issues) - Jurisdiction, Tribunal (final decision of Board) (refusal to refer to Hearings Officer).

A bank teller appealed a decision of the Board denying benefits for an accident. The Board found that the worker was not employed in an industry covered by Part I of the Workers' Compensation Act. Section 127 provides that Part I applies only to industries mentioned in Schedules 1 and 2. Banking is not included in the Schedules. The worker submitted that denial of her claim on this basis was an infringement of the Charter of Rights.

The Board refused to refer the worker's appeal from the decision of the Decision Review Specialist to the Hearings Officer. The Manager of the Hearings Branch wrote to the worker outlining the Board's reasons. This letter constituted the final decision of the Board on the matter.

Even adjudicators with undisputed jurisdiction in constitutional matters should only deal with constitutional issues when such issues cannot be fairly avoided. In this case, the worker's entitlement to workers' compensation benefits could only be established through a successful constitutional challenge. Therefore, it was not possible to avoid the constitutional issue.

The worker intended to argue that the exclusion of bank employees from the provisions of the Workers' Compensation Act was a breach of the right to security of the person in s.7 and the equality rights in s.15 of the Charter.

Section 52(1) of the Constitution Act, 1982, provides that the constitution is the supreme law of Canada and any law that is inconsistent with the provisions of the constitution is, to the extent of the inconsistency, of no force or effect. Section 24(1) of the Charter of Rights provides that anyone whose rights or freedoms guaranteed by the Charter have been infringed may apply to a court of competent jurisdiction to obtain an appropriate and just remedy.

The Panel considered whether the Tribunal was a court of competent jurisdiction. In *Cuddy Chicks Ltd. v. Ontario Labour Relations Board*, the majority of the Court of Appeal held that the OLRB was authorized by s.52(1) of the Constitution Act, 1982, to consider the validity of the section in issue. A different majority held that the OLRB was not a court of competent jurisdiction, however, this decision was not necessary to the outcome of the case. A number of other cases have held that only a court in the traditional sense can be a court of competent jurisdiction and that administrative tribunals are not courts for the purposes of s.24(1) of the Charter.

In the equally-authoritative French version of the Charter, the words corresponding to "a court" are "un tribunal". While it could be argued on the basis of the French version that an administrative tribunal is included in s.24(1), it could also be argued that, in construing bilingual legislation, a word should not be given a meaning in one version that the corresponding word in the other version cannot bear. The Panel also noted that the word tribunal is used elsewhere in the Charter. This would indicate that different meanings were intended.

The worker relied on the Supreme Court of Canada decision in *Mills v. The Queen*. However, *Mills* was not direct authority on the status of an administrative tribunal since it dealt with the status of a Provincial Court judge presiding at a preliminary inquiry. In *Mills*, the Supreme Court appeared to be making the point that Charter issues ought to be dealt with when they come up in the ordinary course of consideration of cases by courts exercising their usual jurisdiction. If the Tribunal were a "court", then *Mills* would make it clear that the Tribunal was a court of competent jurisdiction.

Two previous decisions of the Tribunal indicated that the Tribunal could be a court of competent jurisdiction in appropriate circumstances. However, those statements were obiter and were made without reference to the countervailing judicial authority.

The Panel concluded that the Tribunal was not a court of competent jurisdiction for any purpose under s.24(1) of the Charter.

Based on the binding authority of *Cuddy Chicks*, the Tribunal is authorized to hear and determine the constitutional issues presented by the worker in this case. However, a further issue was whether the Tribunal was obligated to do so. If the Tribunal was not obligated, then the question would be whether the Tribunal was a convenient forum to deal with those issues. These issues were not part of the issue agenda considered at the hearing. The Panel accordingly deferred its decision on these issues until it received submissions from the parties. However, a majority of the Panel outlined its analysis which persuaded it that it was still an open question whether an administrative tribunal may refuse to deal with constitutional questions. The Worker Member expressed no opinions on these issues, preferring to wait for submissions.

In *Cuddy Chicks*, the OLRB had decided that it would exercise its power of constitutional review. Therefore, the view of the Court of Appeal on whether the OLRB was bound to deal with the constitutional issues was not strictly binding. Two cases referred to in *Cuddy Chicks* gave some indication that administrative tribunals were not obligated to consider the constitutional issues. In *Blainey v. Ontario Hockey Association* and in *McKinney v. Board of Governors of University of Guelph*, the parties moved by way of direct application to a judge of the Supreme Court for determination of the constitutional issue. If the administrative tribunals involved were obligated to hear the issue, then the remedy would have been an application for judicial review to the Divisional Court for an order directing the tribunal to hear and determine the issue.

If *Blainey* and *McKinney* establish that there is a choice of forum, the question arises as to whether the choice is entirely up to the parties. Section 52(1) of the Constitution Act, 1982, is no more than an explicit statement of what would be understood implicitly in any event, i.e., that constitutionally invalid law is of no force or effect. Therefore, the role of administrative tribunals did not necessarily change by reason of its enactment. Prior to 1982, the usual practice was for administrative tribunals not to be asked to decide constitutional questions and, if asked, to refuse to decide. However, it seemed that administrative tribunals were never actually precluded from dealing with constitutional challenges. Section 52(1) states what is to happen when a legislative enactment is determined to be inconsistent with the constitution but does not deal with the question of who is to make the determination.

It is the common law right to assume the constitutional validity of legislation which allows courts and adjudicators to ignore potential constitutional issues, at least until they are expressly raised by the parties. In appropriate circumstances, the assumption may be set aside to deal with the issue on its merits. The superior courts of the provinces have always been considered to be the appropriate forum to set the assumption aside, at least until *Cuddy Chicks*.

The Panel would decide the remaining issues after receiving further submissions. [44 pages]

WCAT Decision Considered: Decision No. 227L (1987), 6 W.C.A.T.R. 1; Decision No. 434 (1987), 4 W.C.A.T.R. 183; Decision No. 302/88 (1989), 10 W.C.A.T.R. 162; Decision No. 423/88 (1988), 10 W.C.A.T.R. 16; Decision No. 755/88 (1988), 10 W.C.A.T.R. 328; Decision No. 872/87

Other Statutes Considered: Canadian Charter of Rights and Freedoms, s. 24(1); Constitution Act, 1982, s. 52(1)

Cases Considered: *Alli* (1988), 51 D.L.R. (4th) 555 (Fed.C.A.); *Blainey v. Ontario Hockey Association* (1986), 54 O.R. (2d) 513 (Ont.C.A.); *Cuddy Chicks Ltd. v. Ontario Labour Relations Board* (1989), 62 D.L.R. (4th) 125 (Ont.C.A.); *Delta Airlines*, 11 L.R.R.M. 1159 (1982); *Greater Niagara Transit Commission v. Amalgamated Transit Union, Local 1582* (1987), 43 D.L.R. (4th) 71 (Ont.Div.Ct.); *Labour Relations Board of Sask. v. John East Iron Works*, [1948] 4 D.L.R. 673 (A.C.); *McKinney v. Board of Governors of University of Guelph* (1987), 63 O.R. (2d) 1 (Ont.C.A.); *Mills v. The Queen* (1986), 29 D.L.R. (4th) 161 (S.C.C.); *Minto Construction Ltd. v. Regional Assessment Commissioner, Region 3* (1989), 58 D.L.R. (4th) 52 (Ont.H.C.J.); *Moore v. The Queen in right of B.C.* (1988), 50 D.L.R. (4th) 29 (B.C.C.A.); *Re Nash and The Queen* (1982), 70 C.C.C. (2d) 490 (Nfld. Prov. Ct.); *Ontario Public Service Employees Union v. Algonquin College* (Ont. Div. Ct.) (unreported); *Re Poirier and Minister of Veteran Affairs* (1989), 58 D.L.R. (4th) 475 (Fed. C.A.); *R. v. Big M Drug Mart*, [1985] 1 S.C.R. 295; *R. v. Garret*, [1907] 1 K.B. 881; *R. v. Morgentaler*, 14 D.L.R. (4th) 184 (Ont.C.A.); *R. v. Tokar* (1984), 11 D.L.R. (4th) 456; *St. Lawrence College of Applied Arts and Technology v. OPSEU* (Ont.Div.Ct.) (unreported); *Schacter v. The Queen* (1990), 66 D.L.R. (4th) 635 (Fed.C.A.); *Sherman Sand and Gravel* (May 1, 1978) (OLRB) (unreported); *Sirois* (1988), 90 N.R. 39 (Fed.C.A.); *Tomko v. Labour Relations Board* (N.S.) (1975), 69 D.L.R. (3d) 250 (S.C.C.); *Tetreault-Gadoury* (1988), 53 D.L.R. (4th) 384

(Fed.C.A.); Third Dimension Manufacturing Ltd., [1983] OLRB Rep. Dec. 1800; Re United Nurses of Alberta, Local 115 and Foothills Provincial General Hospital Board (1987), 40 D.L.R. (4th) 163 (Alta.Q.B.); Vincer (1987), 46 D.L.R. (4th) 165 (Fed.C.A.); Zvarich v. A.G. Can. (1987), 3 F.C.R. 253 (Fed.C.A.)

DECISION NO. 637/90 (04/12/90) Pfeiffer Lebert Seguin

Access to worker file, s. 77.

Access to the worker's file was granted to the employer. [3 pages]

DECISION NO. 653/90 (04/12/90) Kenny Robillard Aspey

Temporary partial disability (wage loss benefits) (self-employed worker) - Board Directives and Guidelines (temporary partial disability) (wage loss benefits) (self-employed worker).

A self-employed worker with personal coverage suffered a compensable back injury in June 1983. He appealed a decision of the Hearings Officer granting only 50% partial disability benefits from June 1984 to July 1986.

The Board granted benefits for a neck injury for the acute phase only. The Panel found that the worker was entitled to a pension assessment for any remaining neck disability.

Board policy for self-employed workers with partial disabilities provides that, when the worker is unable to perform all of the pre-accident duties, an estimate is made of the worker's current working ability and this percentage is deducted from his benefits.

The worker was temporarily partially disabled during the period in question. He had many limitations but was capable of working for short periods of time and a return to work was important to his overall rehabilitation.

Section 40(2)(a) applied in this case. The worker worked far fewer hours than if he were not disabled but he did return to making some business decisions and worked several hours per week in his store. The return to work in his own store was a return to suitable employment. The worker estimated that his contribution to the business was about 10% as compared to his pre-accident contribution. According to the Board policy, his benefits would be reduced by 10%. However, s. 40(2)(a) required the Panel to consider what the worker was able to earn in suitable employment. This was not necessarily the 10% which would result from application of the Board policy.

The Board policy was not unreasonable, considering that self-employed workers can decide how much they will be paid and that the policy provides a fast method of calculating benefits. However, the Panel must apply the wording of the Act to the facts of the individual case. In this case, there was evidence that, with his limited participation, the worker was unable to earn any money in the business. According to unaudited business statements, the business operated at a loss after the accident. If that is the case, the worker would be entitled to full benefits under s. 40(2)(a). However, an investigation of what the worker was able to earn had not yet actually been made. The Panel directed the Board to make this determination in accordance with the principles set out in the decision.

The appeal was allowed in part. [13 pages]

Board Directives and Guidelines: Claims Adjudication Branch Procedures Manual, Directive no. 33-19-09

DECISION NO. 785/90 (04/12/90) Stewart Cook Ronson

Supplements, older worker (age) - Rehabilitation, vocational (benefit for older worker).

A construction worker suffered a back injury in 1977, for which he was receiving a 25% pension. The worker appealed a decision of the Hearings Officer denying an older worker supplement from October 1986 to July 1989.

The worker was 49 years old at the commencement of the period in question. He had a grade 5 education in Italy and was not fluent in English. The Panel found that the worker could be considered an older worker. However, it was not established that he would not benefit from rehabilitation. He had found alternate employment as a janitor on two occasions. The worker considered himself totally disabled, although this was not supported by the medical reports. The Panel found that the most significant barrier to the worker's employment was his perception of the extent of his disability. The appeal was dismissed. [6 pages]

WCAT Decisions Considered: Decision No. 320/88 (1988), 9 W.C.A.T.R. 292; Decision No. 737/88 (1988), 10 W.C.A.T.R. 318
Board Directives and Guidelines: Claims Adjudication Branch Procedures Manual, Document no. 33-20-17

DECISION NO. 160/90 (05/12/90) Carlan Beattie Jago

Continuing entitlement.

The worker suffered a back injury in December 1979. She appealed a decision of the Hearings Officer denying entitlement subsequent to March 1982.

The majority of the Panel found that the accident was minor and that the worker recovered by the time benefits were terminated. Continuing pain was not related to the accident.

The appeal was dismissed.

The Vice-Chairman, dissenting, found that the worker never completely recovered and that she continued to experience pain. She was entitled to a pension for chronic pain of between 10% and 15%. [6 pages]

DECISION NO. 351/90 (05/12/90) Moore Fox Nipshagen

In the course of employment (break) - In the course of employment (status) - Arising out of employment (risk analysis).

The worker appealed a decision of the Hearings Officer denying entitlement for an accident. The accident occurred as the worker was returning from a coffee break that he had taken on the concourse level of a large office building in which he worked.

Regarding the issue of whether the accident occurred in the course of employment, Tribunal decisions have generally applied either an activity test or a location test. The Panel found that a consistent factor in both tests was a consideration of whether the employer retained some degree of control over the worker. The presence of retained authority will establish the worker's status at the time of the accident.

In this case, the worker was on an authorized coffee break, many workers of the employer took their breaks in the concourse, the duration of the break was short and taking his break at this location was a routine part of the worker's day. The Panel found that the worker was in the course of employment.

In considering whether the accident arose out of employment, the Panel considered whether the employment contributed in a significant way to the accident. In this case, the worker simply misstepped as he walked the stairs while returning from coffee break.

The Panel considered risk analysis and noted two approaches: positional risk and actual risk. In the

case of an unexplained fall, the actual circumstances of the fall would not matter under the positional risk analysis but would matter under the actual risk analysis. The usefulness of each analysis would probably depend on whether a location test or activity test were used in considering whether the worker was in the course of employment, since, at some point, the nature of the activity must be considered.

The status test used by the Panel considered activity. The Panel preferred to consider activity under arising out of employment as well. This allowed the most flexibility.

The Panel adopted the actual risk analysis, which was recommended by the Board in a discussion paper on work-relatedness. That analysis requires that the risks to which a worker is exposed in the course of his employment, including neutral risks such as in this case, be considered causally significant if they can be seen, in the circumstances of the worker's employment, to have become employment risks. The Panel concluded that, in this case, the neutral risks were actual risks of employment. The worker was exposed to these risks on a daily basis and they became part of his employment environment. Therefore, the accident arose out of employment.

The appeal was allowed. [14 pages]

WCAT Decisions Considered: Decision No. 24F (1990), 13 W.C.A.T.R. 1; Decision No. 536 (1987), 6 W.C.A.T.R. 59; Decision No. 234/87 (1989), 10 W.C.A.T.R. 64; Decision No. 547/87 (1988), 8 W.C.A.T.R. 160; Decision No. 947/87 (1988), 8 W.C.A.T.R. 207; Decision No. 42/89 (1989), 12 W.C.A.T.R. 85; Decision Nos. 485, 597/87, 1226/87, 1230/87, 148/88, 174/88, 977/88, 674/89, 982/89

Board Directives and Guidelines: Operational Policy Manual, Document no. 03-01-02; Discussion Paper: Work-relatedness in the Workers' Compensation System, WCB, April 20, 1990

DECISION NO. 887/90 (05/12/90) Faubert Ferrari Apsey

Access to worker file, s. 77.

Access to the worker's file was granted to the employer. [4 pages]

DECISION NO. 282/89R (07/12/90) Signoroni Klym Seguin

Reconsideration,

The worker's request to reconsider Decision No. 282/89 was denied. [4 pages]

WCAT Decisions Considered: Decision No. 95R (1989), 11 W.C.A.T.R. 1; Decisions No. 72R, 72R2, 282/89

DECISION NO. 517/89 (07/12/90) Strachan Cook Nipshagen

Hearing loss - Hearing loss (traumatic) - Parties (participation) - Construction.

A construction worker appealed a decision of the Hearings Officer denying entitlement for hearing loss, which the worker related to noise exposure or to a head injury suffered in a fall.

In a preliminary matter, the Panel considered the status of the Schedule 2 employer that employed the worker at the time of the fall. The Panel found that this employer should have full rights to question about noise exposure. It was open to the Board to find that the work with this employer contributed to any noise induced hearing loss.

The hearing loss was not related to the trauma of the fall, considering the medical reports and the delay from the time of that accident until treatment for hearing loss was sought. The hearing loss also was

not congenital. The worker's daughter had hearing loss in one ear but it was not similar to the worker's bilateral hearing loss.

The Panel found that the hearing loss was noise induced. The worker had worked on more than 50 different projects for 20 different employers from 1970 to 1986. It was, therefore, understandable that there was not evidence to establish noise exposure in accordance with the Board guidelines. However, the Panel found that the worker worked with noisy equipment. There was medical evidence that some equipment, such as ramset guns, exposed the ears to levels higher than those from which recovery easily takes place.

The worker's employment was a significant contributing factor to his hearing loss. The appeal was allowed. [9 pages]

DECISION NO. 506/90 (7/12/90) Marcotte Klym (dissenting) Meslin

Credibility (conflict with other witnesses) - Evidence (inconsistencies) (description of accident) - In the course of employment (employer's premises).

The worker sought benefits for a period subsequent to November 1985 and for a period subsequent to February 1987 with respect to a low back disability which he claimed was related to an August 1984 compensable accident.

The majority of the Panel found that the worker's lumbosacral sprain, sustained in August 1984, had resolved itself by November 1985, on the basis of the worker's ability to perform his regular strenuous duties from March 1985 to November 1985. During that period there was no medical treatment and lack of convincing evidence of complaint to co-workers.

The majority of the Panel found that in November 1985 there was neither a recurrence of the 1984 accident nor a new compensable injury.

The majority found that the evidence at the hearing of all witnesses on both sides lacked credibility. In those circumstances, the majority preferred the version of the November 1985 events which had been given to a WCB claims investigator by the worker and a co-worker three years prior to the hearing. Based on the worker's statements to the investigator that while walking around the shop, prior to having commenced working, his back gave out for no apparent reason, the majority concluded that there was no accident arising out of and in the course of employment in November 1985.

The Worker Member, dissenting, found that the worker's August 1984 strain was a serious one which had not resolved itself by November 1985 and that at that time a recurrence or aggravation of the previous injury occurred.

The Worker Member agreed that the testimony at the hearing was of dubious probative value and that the statements to the investigator were more reliable. However, he would have found that the worker, while walking around the shop prior to commencing the physical aspects of his duties, was in the course of employment. The presumption under s. 3(3) of the Act applied so that the accident also arose out of the employment. Thus even if the November 1985 injury was not related to the August 1984 injury, it would still be compensable. [13 pages]

Cases Considered: Phillips v. Ford Motor Co. of Canada (1971), 18 D.L.R. (3d) 641 (Ont. C.A.); Faryna v. Chorny, [1952] 2 D.L.R. 354 (B.C.C.A.)

DECISION NO. 579/90 (7/12/90) Chapnik McCombie Shuel*Continuing entitlement.*

The worker sought continuing benefits, after May 1976, for a wrist injury that he claimed was causally related to compensable accidents in 1963 and March 1976.

The 1963 accident involved laceration of the left thumb and a chip fracture of the top of the distal phalanx of the left thumb. It was not a significant contributing factor to the worker's continuing left wrist problems. No wrist injury was reported at the time of the accident nor was there continuity of treatment or complaint subsequently. The worker's return to his regular work indicated that he had fully recovered from the 1963 accident by 1976.

On the other hand, the March 1976 accident was a serious one, involving a crush injury to the left wrist which caused swelling and tenderness and possibly a fracture to the wrist diagnosed as pseudoarthrosis. Despite the worker's return to his regular job in May 1976, the Panel found that the worker's wrist had not reverted to its pre-accident state. The March 1976 accident was a significant causal factor to the worker's ongoing wrist disability. [7 pages]

DECISION NO. 863/90L (07/12/90) Sandomirsky Jackson Apsey*Leave to appeal (good reason to doubt correctness) (consideration of evidence).*

The worker applied for leave to appeal a decision of the WCB Appeal Board denying further benefits. The Appeal Board could have dealt more thoroughly with the issues and the evidence. However, it appeared that the Appeal Board did consider all the issues and evidence and reached a credible conclusion. Leave to appeal was denied. [5 pages]

WCAT Decisions Considered: Decision No. 131 (1986), 2 W.C.A.T.R. 77

DECISION NO. 879/90 (07/12/90) Bigras McCombie Ronson*Commutation (vehicle purchase).*

The worker appealed a decision of the Hearings Officer denying partial commutation of his 10% pension. The worker wanted to pay off a loan from his father. The loan was used to purchase a van, which the worker used to attend a training course and which he would use to look for a job after the course was completed.

The worker met the requirements of the Board policy under s. 26. The van was a rehabilitative measure intended to assist the worker in obtaining and maintaining employment. It would reduce the effects of his disability. The reduction in income would not be significant. The appeal was allowed.

The Worker and Employer Members noted in an addendum that it was incumbent on the Board to consider the worker's request for commutation of a 10% pension under s. 45(4), yet there was no indication that it did. [6 pages]

Board Directives and Guidelines: Guidelines for the Commutation of Pensions, Board Minute 3, March 20, 1989, p.71

DECISION NO. 842/88 (10/12/90) Bigras Ferrari Barbeau

Exposure (isocyanate fumes) - Chronic obstructive lung disease - Automotive industry (auto body repair).

The wife of a deceased worker appealed a decision of the Appeal Board denying entitlement for chronic obstructive lung disease. The worker was employed from 1960 to 1977 in the used car department of a car dealership to do auto body repair. During this time, he was exposed to materials used in auto body repairs, such as paints, cleaning agents and auto body fillers.

Most of the products used in body shops during the period contained isocyanates, a dangerous substance that can cause damage to the respiratory system. The worker's condition was compatible with exposure to isocyanates. The Panel found that the worker's chronic obstructive lung disease was either caused or aggravated by employment exposure. The appeal was allowed. The matter was referred back to the Board for determination of benefits. [13 pages]

WCAT Decisions Considered: 842/88L

DECISION NO. 715/90 (10/12/90) Bigras Ferrari Barbeau

Jurisdiction, Tribunal (final decision of Board) - Issue setting - Referral to Board.

The worker appealed a decision of the Hearings Officer denying entitlement for an upper back condition in 1984 which the worker related to a compensable accident in 1975.

The employer submitted that the condition was related to a preexisting condition. The Panel noted that, in 1988, the Board granted entitlement for a back injury suffered in 1974 while the worker was working for a different employer. It was possible that the worker's condition in 1984 was a recurrence of the 1974 injury.

However, the worker was not prepared to proceed on this point.

The Panel had jurisdiction to consider a relationship to the 1974 accident. The Panel found that it could not satisfactorily separate the issues in order to consider the relationship to the 1975 accident only. The Panel decided to send the case back to the Board to consider the relationship to the 1974 accident. The Board has expertise and established processes for investigation. In fairness, the parties should benefit from this type of investigation. The parties could appeal to the Tribunal after exhausting Board procedures. [17 pages]

WCAT Decisions Considered: Decision No. 206A (1988), 9 W.C.A.T.R. 4; Decision No. 915 (1987), 7 W.C.A.T.R. 1; Decision No. 638/89I (1989), 12 W.C.A.T.R. 221; Decision No. 487/89I

DECISION NO. 804/90 (10/12/90) Bigras Robillard Seguin

Suitable employment.

The worker suffered a low back strain in July 1987. The worker appealed a decision of the Hearings Officer denying entitlement from October 1987 until December 1988.

The worker attempted modified work in September and October 1987 but laid off because of pain. The Board found that the worker refused suitable employment. The Panel found that the worker was in pain and could not continue with the work. In December 1988 the worker was diagnosed with a herniated disc and underwent surgery in 1989. The Panel found that the worker was unable to perform the modified work during the entire period in question. The appeal was allowed. [19 pages]

DECISION NO. 826/90 (10/12/90) Bradbury Robillard Chapman

Access to worker file, P. D. 1 (harmful information).

The worker was appealing a decision of the Hearings Officer denying entitlement for psychological and back disabilities. The worker objected to release of certain reports which were included in the Case Description. These documents had not been released to the worker by the Board, pursuant to s. 77(2), due to their sensitivity.

The Panel found that the reports were relevant to the issue in dispute. However, certain sentences in the reports were not relevant. The reports should be released to the employer with the deletions noted by the Panel. [4 pages]

Practice Directions Considered: Practice Direction No. 1 (1986), 1 W.C.A.T.R. 220

DECISION NO. 895/90 (10/12/90) Signoroni Lebert Shuel

Withdrawal (of appeal).

The worker was allowed to withdraw the appeal in order to pursue some issues further at the Board. [4 pages]

DECISION NO. 901/90 (10/12/90) Bigras Robillard Jago

Access to worker file, s. 77.

Access to the worker's file was granted to the employer. [3 pages]

DECISION NO. 902/90 (10/12/90) Bigras Robillard Jago

Access to worker file, s. 77.

Access to the worker's file was granted to the employer. [3 pages]

DECISION NO. 761/90 (11/12/90) McGrath Robillard Sutherland

Preexisting condition (splayfoot) - Metatarsalgia.

The worker injured the top of her left foot at work when a chair fell on it in January 1984. No time was immediately lost from work. The worker experienced gradually increasing pain and discomfort which finally required medical care six weeks later in March 1984. In September 1984 the worker had surgery performed on the left foot. No similar symptoms or surgery were experienced with respect to the right foot.

The worker had a preexisting, underlying condition of splayed feet with bunion formation which was successfully treated by the left foot surgery. The falling chair caused immediate and gradually increasing metatarsalgia which eventually disabled the worker and required surgery. The asymptomatic underlying condition was rendered symptomatic by the compensable accident. In order to relieve the symptoms, the

underlying condition had to be corrected. The worker was entitled to benefits for lost time for medical appointments from March 1984 onwards and for the September 1984 surgery. [7 pages]

DECISION NO. 833/90 (11/12/90) Moore Robillard Jago

Access to worker file, s. 77.

Access to the worker's file was granted to the employer. [4 pages]

DECISION NO. 855/90 (11/12/90) Onen Robillard Nipshagen

Temporary disability (beyond pension level).

The worker suffered a back injury in 1981 for which he was awarded a 10% pension. He suffered a further injury 1984. The worker laid off again in September 1985 and received benefits until September 1987. The worker appealed a decision of the Hearings Officer denying benefits subsequent to September 1987.

On the evidence, the worker was no longer disabled from working by September 1987. The appeal was dismissed. [8 pages]

DECISION NO. 860/90 (11/12/90) Sandomirsky Drennan Meslin

Delay (onset of symptoms).

The worker suffered a shoulder injury in 1977 and a back sprain in 1978. The worker appealed a decision of the Hearings Officer denying entitlement for a neck condition in 1985.

There was no evidence that the worker suffered a neck injury in either of the compensable accidents. There was no continuity of treatment. The worker's degenerative neck condition was not related to the compensable accidents. The appeal was dismissed. [6 pages]

DECISION NO. 881/90 (11/12/90) Sandomirsky Drennan Barbeau

Access to worker file, s. 77.

Access to the worker's file was granted to the employer, except for a few irrelevant references. [4 pages]

DECISION NO. 883/90 (11/12/90) Faubert Ferrari Apsey

Continuing entitlement.

The worker suffered a low back strain in January 1988. She appealed a decision of the Hearings Officer denying continuing entitlement subsequent to February 1988. On the evidence, the worker was capable of returning to her regular work by the time benefits were terminated. The appeal was dismissed. [5 pages]

DECISION NO. 903/90 (11/12/90) Bigras Robillard Jago

Access to worker file, s. 77.

Access to the worker's file was granted to the employer. [3 pages]

DECISION NO. 611/90 (12/12/90) Marafioti Ferrari Jago

Continuity (of treatment).

The worker injured his shoulder in a fall on February 1, 1974, and received benefits until his return to work on February 12, 1974. The worker appealed a decision of the Hearings Officer denying subsequent entitlement. Considering lack of continuity of treatment and complaint, the Panel found that subsequent shoulder problems were not related to the compensable accident. The appeal was dismissed. [6 pages]

DECISION NO. 612/89 (13/12/90) Strachan Lebert Jago

Accident (occurrence) - In the course of employment (parking lots).

The worker was entitled to benefits for aggravation of a significant preexisting degenerative back condition. On the evidence, the injury was work-related. It occurred either when the worker tripped over a curb in his employer's parking lot, when he lifted a carton of books while loading a truck or as a result of the combination of those two events. The worker reported the parking lot incident immediately and sought medical attention the same day. His account of the events remained consistent throughout.

The employer's parking lot was part of the employer's leased premises. The worker's tripping over the curb occurred in the course of employment as it happened on the employer's premises and it was reasonably incidental to entering the door to begin work. [5 pages]

DECISION NO. 1013/89 (13/12/90) Onen Rao Meslin

Earnings basis (recurrences) - Earnings basis (maximum) - Earnings basis (escalation).

The worker appealed a decision of the Hearings Officer regarding the earnings basis for calculation of benefits. The worker suffered a back injury in 1976. He returned to work, with various interruptions due to his injury, until 1982 when he left because he could no longer perform the work. He then operated his own business. In June 1986, he suffered a further exacerbation of his injury and was granted temporary benefits based on his earnings in 1976 (with one statutory escalation effective January 1986).

The worker submitted that benefits in 1986 should have been calculated in accordance with s. 40 of the pre-1985 Act as continued by s. 134 in 1985 and that, accordingly, his 1976 earnings should have been calculated with reference to the maximum in 1986. Alternatively, he submitted that he was entitled to the statutory escalations provided for in s. 42 of the pre-1985 Act.

The worker did receive the escalation provided for in s. 138, which was added to the Act at the end of 1985. Section 42 was repealed in 1985 by s. 133(1). Section 133(3) provided for escalation of benefits for workers receiving temporary benefits on April 1, 1985. The worker in this case became entitled to temporary benefits in June 1986. Therefore, he was not entitled to the escalations provided for in s. 133.

At the time of the worker's injury in 1976, the statutory maximum allowable earnings was \$15,000, according to s. 44(1) of the Act at that time (s. 45(1) of the pre-1985 Act after consolidation in 1980). This maximum was raised through numerous amendments. A review of the actual amending Acts showed that the increases applied only to accidents occurring after the dates set out in the amendments. Therefore, the worker was not entitled to have his benefits calculated on basis of the statutory ceiling in place in 1986.

The appeal was dismissed. The Panel commented that the Act provides for escalation or increases for a number of workers but that there appeared to be a gap in the legislation for workers such as in this case. The Panel also commented on the complexity of the legislation, which limited accessibility of the Act to the public. [11 pages]

Board Directives and Guidelines: Claims Adjudication Branch Procedures Manual, Documents no. 33-08-10, 33-08-12

DECISION NO. 1021/89 (13/12/90) Carlan Lebert Nipshagen

Heart attack - Presumptions (section 3).

The worker's widow appealed a decision of the Appeals Adjudicator denying dependency benefits for the worker's death from a heart attack. The worker was a long distance truck driver. There was no evidence to establish that long distance truck driving should be considered a stressful job and a precipitator of heart attack or heart disease. The worker had not been working long hours prior to his death. The Panel found that the worker's death was not a disablement.

If the worker's death is considered a chance event in the course of employment, there was evidence to rebut the presumption that the accident arose out of employment. The heart attack was probably the result of the worker's significant underlying condition.

The appeal was dismissed. [8 pages]

WCAT Decisions Considered: Decision No. 42/89 (1989), 12 W.C.A.T.R. 85

DECISION NO. 442/90 (13/12/90) Moore Drennan Nipshagen

Psychotraumatic disability - Permanent disability - Board Directives and Guidelines (pensions) (provisional).

The worker suffered a back injury in 1969. In 1974, he was awarded a 30% pension. In 1976, he was awarded a 25% two-year provisional pension for psychiatric disability. In 1987, he was awarded a 10% two-year provisional pension for psychiatric disability. The worker appealed a decision of the Hearings Officer regarding the pension level for psychiatric disability and the termination of the pension.

The worker was not entitled to a greater pension. He did not have a significant psychiatric disability, considering a number of factors including the absence of psychiatric treatment for 10 years prior to the claim, the fact he was able to work full-time since 1977 and his lack of credibility. Any residual psychiatric disability was covered by the 30% award.

The worker submitted that provisional permanent disability awards were inconsistent with the Act since s. 45(12) of the pre-1989 Act provides that permanent disability is an abnormality or loss after maximal medical rehabilitation has been achieved. The Panel found that provisional psychiatric awards were consistent with the Act. Section 45(1) provides for awards during the lifetime of the worker or such other period as the Board may fix. Section 24 provides for review of any periodical payment and s. 76 provides for reconsideration. These sections confer the right to grant pensions for less than the worker's lifetime. A

policy which builds in a review of a permanent disability award is not inconsistent with the Act.
The appeal was dismissed. [8 pages]

DECISION NO. 724/90 (13/12/90) McIntosh-Janis McCombie Shuel

Exposure (dust) - Smoking - Chronic obstructive lung disease.

The worker appealed a decision of the Appeals Adjudicator denying entitlement for chronic obstructive lung disease which the worker related to dust exposure while working as a labourer at a railway.

On the evidence, the worker was not exposed to any appreciable degree of dust. Work exposure was a minor irritant to a preexisting condition resulting from 35 years of smoking. The appeal was dismissed. [8 pages]

WCAT Decisions Considered: 859/89

DECISION NO. 854/90 (13/12/90) Onen Robillard Nipshagen

Delay (onset of symptoms) - Presumptions (section 3).

The worker collapsed while standing in the box of a dump truck in March 1986. He received benefits for a neck injury until July 1986. The worker appealed denial of benefits for a low back condition and denial of continuing entitlement for the neck condition.

It was not established that the worker suffered a low back injury in the accident. The presumption in s. 3(3) did not apply. It was accepted that the worker suffered an accident. The presumption could not be used to determine the extent of the injuries suffered in the accident.

On the evidence, the neck condition had resolved by the time benefits were terminated in July 1986.
The appeal was dismissed. [9 pages]

WCAT Decisions Considered: Decision No. 24F (1990), 13 W.C.A.T.R. 1

DECISION NO. 865/90I (13/12/90) Robeson Jackson Nipshagen

Access to worker file, P. D. 1.

The employer was appealing a decision of the Hearings Officer denying SIEF relief. The worker objected to release of the Case Description to the employer.

The Panel found that the documents in the Case Description were relevant to the issue in dispute, with some exceptions. The Case Description should be released to the employer with the deletions noted by the Panel. [3 pages]

Practice Directions Considered: Practice Direction No. 1 (1986), 1 W.C.A.T.R. 220

DECISION NO. 880/90 (13/12/90) Sandomirsky Drennan Barbeau

Access to worker file, s. 77.

Access to the worker's file was granted to the employer. [3 pages]

DECISION NO. 897/90 (13/12/90) McIntosh-Janis Chapman Drennan

Psychotraumatic disability - Worker (long term service) - Availability for employment (job search).

The worker suffered compensable accidents in April 1978 and October 1982. He was awarded a 15% pension for organic disability. He was also awarded a 20% two-year provisional pension for psychiatric disability in December 1981 which was extended to June 1984. Temporary benefits were reduced to 50% from March 1984 to November 1984. The worker appealed a decision of the Hearings Officer denying reinstatement of the provisional pension, denying full benefits from March 1984 to November 1984 and denying a supplement subsequent to November 1984.

The symptoms giving rise to the provisional psychiatric pension continued without cessation. The medical evidence indicated that there was little hope that these symptoms would cease. The Panel found that the worker was entitled to the 20% psychiatric pension on a permanent basis.

The worker was a long term service employee and, in accordance with Board policy was entitled to full temporary benefits for the six months from March 1984 to September 1984. Since he did not conduct an adequate job search or cooperate with rehabilitation, he was not entitled to full benefits from September 1984 to November 1984 or to a supplement thereafter.

The appeal was allowed in part. [8 pages]

WCAT Decisions Considered: 1077/87, 1180/87

DECISION NO. 926/90I (13/12/90) Onen Ferrari Barbeau

Three week rule (witnesses) - Three week rule (documents) - Adjournment (additional evidence) - Issue setting.

The employer appealed a Hearings Officer decision which granted the worker continuing benefits after August 1988. The appeal was based on the employer's contention that the worker refused suitable employment.

The employer was permitted to call witnesses although the requisite three-week notice had not been given. The witnesses' testimony involved the nature of the suitable employment that the employer claimed to have offered the worker and whether the worker's employment was terminated in September 1988. This evidence was relevant to one of the central issues. As the written materials on file provided little information on that point, additional evidence might well assist the Panel. Since the worker was taken by surprise, the hearing was recessed.

The Panel agreed with the worker that the appeal hearing should only cover the period up to November 1989. The Hearings Officer determined that the worker was entitled to temporary benefits for six months after September 1988 and that she was entitled to a further period of temporary benefits at the 50% level. Subsequent periods of entitlement were left to the Board's initial levels of adjudication for determination. The periods of entitlement after November 1989 were sufficiently different that the issues could be severed.

The Panel noted that its findings in this case could none the less have an effect on benefits after November 1989. Moreover, all Board file materials relevant to entitlement after November 1989 were to be

provided to the Panel, including a vocational rehabilitation report which was submitted by the Tribunal Counsel office contrary to the three-week rule. This material would serve largely as background for the matter before the Panel. [5 pages]

DECISION NO. 829/87L2 (14/12/90) Faubert Ferrari Apsey

Leave to appeal (substantial new evidence) (medical report).

In Decision No. 829/87L, the Tribunal denied leave to appeal from a decision of the Appeal Board refusing entitlement for a neck disability, headaches, dizziness and memory loss. The Tribunal exercised its power to reconsider after the worker submitted new evidence. Therefore, the Panel considered this hearing as a new application for leave.

The worker related his condition to an accident in which he was struck on the head. The Appeal Board denied entitlement on the basis of delay in onset of symptoms for more than one year. The new evidence did not address the issue of delay. There was evidence to support the Appeal Board conclusion. Leave to appeal was denied. [7 pages]

WCAT Decisions Considered: 829/87L

DECISION NO. 905/89 (14/12/90) Starkman McCombie Nipshagen (dissenting)

Heart attack - Presumptions (section 3) (standard of proof) - Investigation by Tribunal (pre-hearing) - Medical examination (section 86h) - Jurisdiction, Tribunal (section 86h) - Procedure (section 86h).

The dependants of a deceased worker appealed a decision of the Hearings Officer denying benefits for the worker's death from a heart attack.

In a preliminary matter, the Panel considered the employer's objection to Tribunal counsel obtaining a pre-hearing opinion from a s. 86h assessor. Considering the wording of ss. 86d, 86e and 86h, the Panel found that only a panel of the Tribunal could seek the assistance of a s. 86h assessor. The Panel set out a procedure which it felt was most appropriate for seeking assistance under s. 86h. The Tribunal Counsel Office should write to the worker, asking if there was any objection to obtaining the medical information. If there is no objection, the letter could be sent to the assessor. If there is objection and the concerns of the parties cannot be accommodated and Tribunal counsel continues to believe that the pre-hearing assistance is required, the matter should be referred to a panel. After considering the request and the submissions, the panel would make a decision in accordance with s. 86h. In certain circumstances, it panel may ask for further written or oral submissions but there would be no absolute right to make oral submissions. It would always remain open to the parties to raise objections to the Hearing Panel.

The worker was a 55 year old construction labourer. He went to place a tarpaulin over a form. He had to climb a scaffold in order to do this. The temperature was between minus 2 and minus 20 degrees Celsius. He was found 40 minutes later slumped over the scaffolding.

The heart attack was an accident in the course of employment. The presumption was applicable. The majority of the Panel stated that the standard of proof to rebut the presumption was clear and convincing evidence that the accident did not arise out of employment. The worker had a number of risk factors associated with heart attack. There was no compelling theory of employment relatedness other than the temporal connection. However, there was no clear and convincing evidence to rebut the presumption. The appeal was allowed.

The Employer Member, dissenting, stated that the standard to rebut the presumption was a balance of

probabilities and that this could only be reached in the absence of any unresolvable, substantial theories of employment relatedness. In this case, there was evidence on the balance of probabilities to rebut the presumption. The Employer Member examined all the theories of employment relatedness (unusual exertion, cold, spasm, fall while climbing) and found that none was a substantial possibility. [21 pages]

WCAT Decisions Considered: Decision No. 72 (1986), 2 W.C.A.T.R. 28; Decision No. 42/89 (1989), 12 W.C.A.T.R. 85; Decision No. 550/89

DECISION NO. 1004/89 (14/12/90) Starkman Fox Nipshagen

Jurisdiction, Tribunal (federal worker) - Collective agreement - Statutory interpretation (incorporation by reference) - Legal precedent - Merits and justice - Medical examination (section 21).

The worker was an employee of a federal Crown agency, the employees of which were subject to the Government Employees Compensation Act (Can.). Section 4(2) of that Act entitles such employees to receive compensation "at the same rate and under the same conditions" as provided under the compensation law of the province where the worker is usually employed. The worker filed a claim for compensation. The employer requested, pursuant to the terms of a collective agreement, that the worker attend a medical examination with a physician of the employer's choice. The worker did not attend and instead sought a determination, pursuant to s. 21(2) of the Workers' Compensation Act (Ont.), that he did not have to attend the examination.

Similar issues were determined by a differently constituted panel in Decision No. 696/88. The Panel was thus required to consider the role of precedent in Tribunal proceedings. The Panel noted that the Tribunal was a relatively young organization interpreting a statute in a field in which there had been no concerted effort to publish adjudicators' decisions. Unlike some other similar adjudicative bodies, the Tribunal did not have decades of prior decisions to which it could refer. Many Tribunal decisions represent the first effort at considering an issue in a public manner. Time was required for the various approaches to issues to be analyzed and reviewed.

The Panel concluded that while a panel is obliged to consider every argument put to it in a particular case, there is also an obligation to be advised of prior Tribunal decisions dealing with similar issues, particularly when the same parties are involved. Where issues as to the Tribunal's jurisdiction are involved, it would seem that the Tribunal must get the answer right, while for decisions concerning interpretation of provisions of the Workers' Compensation Act, there is considerable merit in giving weight to previous decisions so as to promote consistency of decision making.

The appropriate weight to be given to prior Tribunal decisions falls to be determined in the context of the particular case and is largely dependent on the facts and the nature of the issues. However, when a subsequent Panel substantially departs from the reasoning of a previous decision, there is an obligation to address the reasons for the departure. In this case, the Panel, based upon its assessment of the legislation in light of the arguments presented, arrived at a conclusion in conformity with that reached in Decision No. 696/88. It was thus unnecessary to undertake a more thorough analysis of the role and importance that precedent should play in the Tribunal's decision-making process.

The Workers' Compensation Act reflects a balancing of the concerns of workers and employers. Its various provisions must be read in the context of the entire statute. Section 21 is an integral part of the scheme for compensating injured workers and is thus a "condition of entitlement" to compensation within the meaning of s. 4(2) of the Government Employees Compensation Act. Section 16 of the Worker's Compensation Act is also part of the scheme for entitlement to benefits. It prevents a worker from being competent to contract out of his rights under the Act. The Panel thus had jurisdiction to determine the worker's objection to the medical examination under s. 21(2), notwithstanding that the employer's request was purportedly made pursuant to the terms of a collective agreement rather than under s. 21(1).

The Panel did not accept the worker's argument that the employer's request for an examination was moot because the worker had returned to work. It was open to the employer to appeal the worker's entitlement to benefits for the period during which the worker had been off work and had received benefits. The employer required further medical information with respect to the worker's condition during that period and thus had a valid compensation goal in requesting the examination.

Section 21 is intended to provide the employer with medical information, provided that it is not available elsewhere. In this case, the employer had not made a request, pursuant to s. 77 of the Workers' Compensation Act, for access to the medical reports already in the worker's file. These reports might ultimately provide the employer with the information that it sought. The worker's application was thus allowed and the worker was not required to attend for a medical examination. [21 pages]

WCAT Decisions Considered: Decision No. 174 (1986), 2 W.C.A.T.R. 96; Decision No. 185 (1986), 3 W.C.A.T.R. 110; Decision No. 696/88 (1989), 10 W.C.A.T.R. 308

Other Statutes Considered: Government Employees Compensation Act, R.S.C. 1985, c. G-5

Cases Considered: Wickett and Craig Ltd. (1963), 13 L.A.C. 363; E. Blake and Amalgamated Transit Union and Ontario (Toronto Area Transit Authority) (1988), G.S.B. 1276/87; Oakwood Park Lodge, [1980] O.L.R.B. Rep. Oct. 1501; St. Clair College of Applied Arts and Technology, [1980] O.L.R.B. Rep. July 1067; Ching v. Cdn. Pacific Railway, [1943] 3 D.L.R. 737 (S.C.C.); R. v. Bender, [1947] 2 D.L.R. 161 (S.C.C.); Thompson v. Oakville (Town) (1963), 41 D.L.R. (2d) 294 (Ont. H.C.); Canada (A.G.) v. Ahenakew, [1984] 3 W.W.R. 442 (Sask. Q.B.); Canada (A.G.) and Base Borden Collegiate Institute (1980), 30 O.R. (2d) 428 (Ont. Div. Ct.)

DECISION NO. 247/90I (14/12/90) Moore McCombie Apsey

Accident (occurrence) - Notice of hearing.

The worker, a bakery employee, was entitled to benefits for a back injury. On the evidence, there was a genuine workplace accident when a stack of trays fell over and struck the worker's low back. As a result the worker suffered a genuine organic injury. A doctor's statement, that there was psychogenic magnification of symptoms, did not mean that the worker was faking an injury. The worker was thus entitled to benefits for that accident which occurred in January 1984.

The hearing of the worker's appeal with respect to benefits after December 1984 was recessed. The worker claimed for a recurrence of the January 1984 injury. The January 1984 employer alleged that the worker's disability in December 1984 related to the worker's activity in December 1984 with a second employer.

The second employer was to be given notice of this appeal. As the worker and the first employer were prepared to proceed by way of transcript evidence and written submissions, the Panel established alternative procedures to be followed depending on whether the second employer wished to participate in the appeal and whether the second employer chose to call further evidence. [8 pages]

WCAT Decisions Considered: Decision No. 615/87I

DECISION NO. 418/90 (14/12/90) McGrath Robillard Jago

Accident (occurrence).

The worker appealed a decision of the Hearings Officer denying entitlement for surgery for a herniated disc. The worker claimed that she aggravated preexisting degenerative disc disease at work when she twisted to lift a tray. Considering the worker's credibility, delay in claiming entitlement and evidence of a

non-compensable fall on ice, the Panel found that the worker did not aggravate her condition at work. The appeal was dismissed. [8 pages]

DECISION NO. 576/90 (14/12/90) McGrath Robillard Jago

Continuing entitlement - Investigation by Tribunal (whether required).

The worker suffered a knee injury on June 15, 1988. He received benefits until his return to work on June 20. He laid off again on June 25. The worker appealed a decision of the Hearings Officer denying benefits subsequent to June 25, 1988.

There was no corroboration of continuing knee problems from doctors or co-workers. There was no need for further investigation of the claim in the circumstances. The appeal was dismissed. [5 pages]

DECISION NO. 701/90 (14/12/90) Faubert Cook Preston

Supplements, older worker.

The worker suffered compensable injuries for which he was receiving pensions totalling 28.3%. The worker appealed a decision of the Hearings Officer denying an older worker supplement from June 1985, when the worker was 55 years old.

The worker was an older worker within Board policy. He underwent a work assessment, which found him to be unemployable. His communication skills in English were limited. He could not perform his usual work because of medical restrictions. The worker's age was a significant contributing factor in his unemployability and the absence of rehabilitation potential. The appeal was allowed. [6 pages]

WCAT Decisions considered: Decision No. 320/88 (1988), 9 W.C.A.T.R. 292

Board Directives and Guidelines: Claims Adjudication Branch Procedures Manual, Document no. 33-20-17

DECISION NO. 801/90 (14/12/90) Faubert Felice Jago

Disability (disabled from working) - Available employment (offer from accident employer) - Rehabilitation, vocational (cooperation).

The worker appealed a decision of the Hearings Officer denying benefits from July to August 1984 and from September to December 1984 for a back disability. The Board originally granted benefits for these periods but reversed its decision when it learned that the worker continued to work during this period at a part-time job as a cashier/sales clerk.

The worker was temporarily partially disabled during the periods in question. Although she was not disabled from performing the part-time work, she was disabled from performing her regular job, which required repetitive bending.

The employer offered the worker her regular job during this time but did not offer modified work. The Panel found that the worker did not cooperate with rehabilitation by failing to inform her doctors and the Board of her part-time work and giving the impression that she was not capable of any work. The worker was entitled to 50% benefits. The appeal was allowed in part. [8 pages]

WCAT Decisions Considered: Decision No. 672/87 (1987), 5 W.C.A.T.R. 97

DECISION NO. 825/90 (14/12/90) Starkman Felice Nipshagen

Accident (occurrence) - Credibility.

The worker appealed a decision of the Hearings Officer denying entitlement for a herniated disc which the worker related to an unwitnessed lifting incident at work. The Panel did not find the worker to be a credible witness. He stated that he had no previous back pain. However, there was evidence from doctors and co-workers that he experienced back pain previously and that it was getting worse. The appeal was dismissed. [7 pages]

DECISION NO. 840/90I (14/12/90) Sandomirsky Lebert Jago

Adjournment (additional medical evidence) - Investigation by Tribunal.

The worker was a forest ranger in 1963 when, en route to a fire, he was thrown from a rail car on which he was riding. He suffered a fractured pelvic bone. The worker appealed a decision of the Appeals Adjudicator denying entitlement for a left hernia, right groin pain and impotence.

There was a lack of continuity of treatment from 1963 to 1981. On the evidence, the impotence resulted from a congenital condition and was not compensable.

The worker had a very limited ability to understand the questions put to him by the Panel. Considering the worker's inability to provide information and the lack of medical reports, the Panel asked the Tribunal Counsel Office to arrange a further medical assessment regarding the relationship between the hernia, pelvic discomfort and coccyx pain to the 1963 accident. [6 pages]

DECISION NO. 871/90 (14/12/90) McIntosh-Janis Cook Seguin

Pensions (assessment) (ankle) - Pensions (arrears) - Delay (onset of symptoms).

In February 1968, the worker was shot with a shot gun in a compensable accident. Lead pellets entered his left ankle and right knee. In 1969, a pension was denied. In 1977, he was awarded a 2% pension for the left ankle with arrears to October 1975. In 1986, it was increased to 6% with arrears to June 1984. In 1988, it was increased to 10% and he was also awarded an 8% pension for right leg disability and a 4% multiple factor with arrears to June 1984. The worker appealed the level of pension, the arrears date and denial of benefits for a low back condition.

The first recorded back symptoms were in 1978 when an x-ray showed a lead shot to the right of the spine. The medical evidence did not support a relationship between the accident and the degenerative back condition.

It was not until the 1988 pension review that there were indications of right leg problems other than numbness. There was no reason to interfere with the Board's decision regarding the right leg.

The Panel could not agree with the nil award for the left ankle in 1969. There were reports of ankle pain after prolonged walking. These same symptoms were found in 1977 when the worker was awarded the 2% pension. The Panel found that the worker was entitled to a 2% pension with arrears to the date of the accident.

The 1977 assessment did not take into account episodes of severe ankle pain. These same episodes of severe pain were taken into account in 1986 when the pension was increased to 6%. The Panel found that the worker was entitled to the 6% pension retroactive to October 1975, when these problems were first noted.

The Panel confirmed the 1988 award. The appeal was allowed in part. [7 pages]

DECISION NO. 898/90 (14/12/90) Bigras McCombie Nipshagen*Hearing loss.*

The worker appealed a decision of the Hearings Officer denying a pension for hearing loss. The worker worked in an auto body shop and was exposed to noise. The Board granted health care benefits for hearing aids but denied a pension on the basis that the worker did not have sufficient hearing loss.

The worker was tested a number of times, both before and after his retirement in 1988. Only in one test, taken shortly before his retirement, did he have sufficient hearing loss for a pension. After removal from exposure his hearing improved. He was not entitled to a pension according to Board policy. The appeal was dismissed. [5 pages]

Board Directives and Guidelines: Operational Policy Manual, Document no. 04-03-06

DECISION NO. 708/89 (18/12/90) Carlan Rao Jago*Suitable employment - Worker (long term service) - Investigation by Tribunal (inspection).*

A sewing machine operator suffered a back injury in February 1985. In February 1986 she returned to work as a floorgirl but laid off after one day. The worker and employer both appealed the level of temporary benefits from February 1986 to December 1986.

The job as a sewing machine operator was not suitable since it required constant sitting. There was conflicting evidence about the job as a floorgirl. The Panel sent an investigator to inspect and report about that job. On the basis of this report, the Panel found that the job as a floorgirl was also not suitable since it required constant bending and walking all day long.

The worker was entitled to full benefits during the entire period in question. Until August 1986, she was entitled to full benefits on the basis of being a long term service employee. From August 1986 to December 1986, she was conducting a job search.

The worker's appeal was allowed. The employer's appeal was dismissed. [8 pages]

Board Directives and Guidelines: Claims Adjudication Branch Procedures Manual, Document no. 33-19-09

DECISION NO. 103/90 (18/12/90) Carlan Robillard Nipshagen (dissenting)*Subsequent incidents (outside work).*

The worker suffered a low back injury in 1981. In 1985, he experienced an onset of pain at home while bending. The employer appealed a decision of the Hearings Officer granting benefits for the incident in 1985.

The majority of the Panel found that the worker was entitled to benefits in 1985. There was continuity of complaint. The incident in 1985 was so trivial that it could not be considered a new accident. The 1981 accident was not the only reason for the 1985 disability but it was a significant factor in the destabilizing of his condition. The appeal was dismissed.

The Employer Member, dissenting, found that the condition in 1985 was a deterioration of a preexisting condition and that the 1981 accident was not a significant contributing factor. [7 pages]

DECISION NO. 718/90 (18/12/90) Faubert McCombie Chapman

Continuing entitlement - Chronic pain.

The worker fractured two cervical vertebrae in a fall in September 1981. The worker appealed a decision of the Appeals Adjudicator denying entitlement subsequent to May 1983.

The evidence was clear that there was no continuing organic disability. Further, the worker was not entitled to benefits for chronic pain. The evidence indicated that the worker was not disabled from working by the time benefits were terminated. The appeal was dismissed. [7 pages]

WCAT Decisions Considered: Decision No. 915 (1987), 7 W.C.A.T.R. 1

DECISION NO. 848/90 (18/12/90) Moore Lebert Preston

Medical examination (section 21) (selection by employer).

The employer applied for an order requiring the worker to attend a medical examination. The employer wanted the examination to obtain information about a preexisting condition and to determine the extent of the worker's disability.

The Panel found that there was a valid compensation goal. However, the best way of obtaining the information the employer wanted would be to obtain a report from the worker's orthopaedic surgeon. Since this doctor had recently examined the worker, a further examination would not be required.

The application was denied. The Tribunal Counsel Office was directed to obtain the alternative evidence. [5 pages]

WCAT Decisions Considered: Decision No. 174 (1986), 2 W.C.A.T.R. 96; Decisions No. 19/87, 656/88, 283/90

DECISION NO. 849/90 (18/12/90) Moore Lebert Preston

Access to worker file, s. 77.

Access to the worker's file was granted to the employer. [4 pages]

DECISION NO. 891/90I (18/12/90) Sandomirsky Cook Jago

Adjournment (additional medical evidence).

The worker appealed a decision of the Hearings Officer denying entitlement for fibrosarcoma, which the worker related to a compensable accident in which he was hit with a wooden pallet.

The Panel had obtained some information about the possible relationship between trauma and fibrosarcoma. However, it needed additional information. The Panel set out a number of questions on which it wanted a report. The hearing was adjourned. [5 pages]

DECISION NO. 910/90I (18/12/90) Sandomirsky McCombie Preston
Reed v. Seberras

Section 15 application - Adjournment (additional submissions) - Procedure (Practice Direction No. 7).

The defendants in a civil action applied to determine whether the plaintiff's right of action was taken away. The defendants requested an adjournment on the grounds that: the plaintiff had not filed a s. 15 statement and that, therefore, the defendants were unsure of the position being taken by the plaintiff; the plaintiff would be testifying, even though this had not previously been confirmed; the plaintiff's employer, which was applying for intervenor status, was now questioning whether the defendant was in the course of employment, even though this was not raised in the employer's statement.

The respondents to the s. 15 application had not complied with the requirements of Practice Direction No. 7. The Panel directed the parties to make clear what the facts and issues are and what evidence they intend to adduce. The adjournment was granted. [6 pages]

Practice Directions Considered: Practice Direction No. 7 (1986), 1 W.C.A.T.R. 231

DECISION NO. 948/90 (18/12/90) Bigras Robillard Barbeau

Access to worker file, s. 77.

Access to the worker's file was granted to the employer, except for several references to elective surgery which were not relevant. [4 pages]

DECISION NO. 461/87 (19/12/90) Strachan Klym Apsey

Supplements, temporary (rehabilitative purpose).

The worker appealed a decision of the Hearings Officer denying a temporary supplement to the worker's pension beyond September 1984. By that date, the worker had been receiving the supplement for approximately 42 months. The Board had supplied rehabilitation services and retraining.

A worker is not entitled to a supplement if unlikely to benefit from a vocational rehabilitation programme and return to work. In this case, it was reasonable for the Board to exercise its discretion to terminate the supplement. The appeal was dismissed. [8 pages]

WCAT Decisions Considered: Decision No. 915 (1987), 7 W.C.A.T.R. 1

DECISION NO. 854/87 (19/12/90) Strachan Drennan Preston

Medical examination (section 21) - Procedure (section 21) (application and merits together) - Adjournment (for judicial review) - Continuing entitlement - Psychotraumatic disability.

The worker suffered a wrist injury in December 1981. The worker appealed a decision of the Appeals Adjudicator denying benefits subsequent to March 1983.

On the first day of the hearing, an adjournment was granted to allow the parties time to review materials submitted by Tribunal counsel less than three weeks before the hearing and to allow the worker to

attend a medical examination. When the hearing reconvened, the employer applied for an order under s. 21 requiring the worker to attend a further medical examination. The Panel decided that, if further medical information was necessary, it would use a medical assessor under s. 86h. The Panel refused an adjournment which the employer requested in order to apply for judicial review of this ruling.

There was uncertainty as to the nature of the worker's condition. However, there was a temporal relationship to the compensable accident and there was continuity of complaint, treatment and symptoms. If forced to label the worker's condition, the Panel would find that the worker was suffering from the non-organic disability of post-traumatic anxiety neurosis.

The worker's condition was permanent by March 1983. She was entitled to a pension assessment. The appeal was allowed in part. [14 pages]

DECISION NO. 492/88R2 (19/12/90) Strachan Beattie Apsey

Reconsideration.

The worker requested the reconsideration of Decision Nos. 492/88 and 492/88R on the basis of new medical evidence.

The worker was receiving a 20% pension for his organic back disability. In November 1986, a further 20% provisional pension was awarded for a three year period. In Decision No. 492/88 the Panel concluded that a developing psychological condition disabled the worker beyond his 20% organic pension level as of January 1985. As a result, the worker was awarded temporary total benefits from January 1985. In the unsuccessful reconsideration request that resulted in Decision No. 492/88R, and in the present reconsideration request, the worker sought temporary total benefits from February 1984.

One of the reports relied on by the worker as new evidence had in fact been considered by the panel in the original decision. Another report and letter relied on by the worker did not offer significant new evidence and did not convince the Panel that the selection of the January 1985 date, in the original decision, was wrong. There was no evidence of a defect in the proceedings or in the content of the decision. The request for reconsideration was denied. [5 pages]

WCAT Decisions Considered: Decision Nos. 492/88, 492/88R

DECISION NO. 120/89 (19/12/90) Strachan Beattie Gabinet

Continuing entitlement - Continuity (of complaint).

The worker slipped on oil in November 1980 and suffered lumbosacral stress. The worker complained that he continued to suffer from numbness in his legs and pain in his back. The worker appealed a decision of the Hearings Officer denying a permanent disability award for residual organic impairment.

There was evidence that the worker suffered from a similar condition in 1979. Based on the preponderance of medical evidence, the Panel found that any exacerbation of the preexisting condition by the compensable accident did not have an organic basis. The Panel made no findings with respect to chronic pain since that issue was still before the Board. The appeal was dismissed. [15 pages]

DECISION NO. 162/90 (19/12/90) Carlan Beattie Jago*Heart attack - Continuing entitlement.*

The worker suffered chest and arm pain while lifting wooden skids at work in January 1979. She was admitted to hospital later that day and an acute myocardial ischemic episode was diagnosed. She received benefits for six weeks. In June 1979 the worker was readmitted to hospital suffering from chest pain and in July 1979 bypass surgery was performed. The worker returned to modified work in January 1980, but laid off permanently in 1985.

The worker had been experiencing some problems and breathlessness prior to the work incident. The history that she first gave at the hospital included a report of shortness of breath for three days prior to the work incident. The worker never gave the events at work as part of the history. The Panel concluded that the worker was suffering from two underlying forms of heart disease prior to the work incident: coronary artery disease and rheumatic heart disease. These were what necessitated the July 1979 surgery and were the source of the worker's continuing disability. Work did not play a significant part in the development of the worker's heart disease.

At the time of the work incident, it was determined that the worker had sustained a muscular sprain, that was estimated to last six weeks. There was no new evidence to justify further entitlement for the sprain. [6 pages]

DECISION NO. 384/90I2 (19/12/90) Moore Jackson Barbeau*Procedure (absent parties) - Adjournment (peremptory hearing date).*

The worker was not present for the hearing of his appeal. Previously, an adjournment had been granted due to the worker's absence.

The Panel could have dismissed the worker's appeal. However, the worker's representative had transferred the worker's file to another representative several days before the hearing due to an emergency. This unexpected change of representatives left the Panel with a measure of doubt as to the worker's reasons for absence. The Panel adjourned the hearing and made the next hearing date peremptory to the worker. [4 pages]

DECISION NO. 553/90 (19/12/90) Bigras Drennan Barbeau*Chronic pain - Supplements, temporary (rehabilitative purpose) - Supplements, older worker - Rehabilitation, vocational (eligibility) (competitive unemployability) - Rehabilitation, vocational (cooperation) - Rehabilitation (considering self totally disabled) (Canada Pension Plan) - Issue setting - Referral to Board.*

The worker, a painter for the past 15 years, injured his back in November 1981. He was awarded a 15% pension in January 1983 that was subsequently increased to 20%, effective July 1987. The worker was granted a temporary supplement commencing February 1983, but it was terminated in April 1983. The worker sought entitlement to benefits for a chronic pain disability.

The Panel found that the worker's pain was not inconsistent with his organic disability. The diagnosis of functional overlay was only made by one doctor back in 1982, before the Board recognized chronic pain and when "functional overlay" had a different connotation. Though the initial diagnosis was a strain, it became apparent that the organic condition was considerably more serious, with significant nerve root involvement.

The worker's condition deteriorated markedly from 1982 to 1987: scoliosis developed, degenerative disease spread and spondylolisthesis appeared. There was no evidence that the worker was impaired beyond the level of his organic disability. The disruptions to the worker's life could not be attributed to anything other than the worker's organic condition. He did not have a chronic pain disability due to the compensable accident.

In letters to the Board, the worker had requested that his supplement be restored. But the Board's subsequent decisions did not address the issue and did not review the grounds for the decision to terminate the supplement. Since the worker's file had first reached the Tribunal in 1985, since the worker's case had already been through three levels at the Board twice, and since all the necessary evidence was before the Tribunal, there was no reason to refer the matter back to the Board. No further submissions were required from the parties as the employer had declined to participate and as the matter was being decided in the worker's favour.

The Board terminated the worker's supplement on the grounds that he was not accepting the level of his disability and that he was unemployable. The Panel agreed that the worker was "unemployable", but that did not mean that he was "untrainable". The worker had problems attending a skills evaluation programme, but the overall tone of the resulting evaluation report was that further action should have been taken. There was scope for consideration of specialized medical attention, psychological counselling and language training. As the Board did not extend reasonable efforts to rehabilitate the worker, while rehabilitation was still possible, there was a rehabilitative purpose to the supplement in April 1983.

As the Board closed the worker's rehabilitation file without offering further appropriate programmes, it could not be said that the worker failed to cooperate. The Panel directed that the supplement be reinstated (less Canada Pension Plan benefits received) from April 1983 up to April 1985, the time when the older worker supplement provision of the Act came into force. Since the worker applied for Canada Pension disability benefits on the suggestion of a Board counsellor, the receipt of those benefits should not be taken as a failure to cooperate or as unavailability for employment, as suggested by the then current Board policy.

By April 1985, the worker's condition had deteriorated to the point where he could no longer be rehabilitated. He was thus not eligible for continuation of the temporary supplement. However, as he was aged 55 at that time and as his age was a contributing factor to his unemployability, the worker was entitled to an older worker supplement. [23 pages]

WCAT Decisions Considered: Decision No. 915 (1987), 7 W.C.A.T.R. 1; Decision No. 3 (1986), 3 W.C.A.T.R. 1;
Pension Assessment Appeals Leading Case Interim Report (1986), 7 W.C.A.T.R. 365
Practice Directions Considered: Practice Direction No. 9 (1987), 7 W.C.A.T.R. 444
Board Directives and Guidelines: Claims Adjudication Branch Procedures Manual, Document nos. 33-20-02, 33-20-17

DECISION NO. 752/90 (19/12/90) Moore Fuhrman Ronson

Earnings basis (unemployment insurance benefits) - Earnings basis (period of unemployment).

A bricklayer suffered a back injury in 1980. His pension was calculated on the basis of his employment earnings during the previous 12 months, not including unemployment insurance benefits he received for a 19-week winter lay-off. The worker appealed the decision of the Hearings Officer confirming this calculation.

The Act requires that the earnings basis be determined in the manner that is best calculated to give the rate at which the worker was remunerated. In this case, the lapse in employment was actually a special aspect of an ongoing employment relationship. Seasonal lay-offs, unemployment insurance benefits and a return to work were anticipated. Therefore, it was appropriate to consider the 12 months prior to the

accident in determining average earnings. It was also appropriate to include the unemployment insurance benefits received by the worker.

The appeal was allowed. [8 pages]

WCAT Decisions Considered: Decision No. 994/88 (1989), 12 W.C.A.T.R. 61; Decisions No. 206/88, 362/90
Board Directives and Guidelines: Claims Services Division Manual, s. 132, p. 275A, Directive 2

DECISION NO. 947/90 (19/12/90) Bigras Robillard Barbeau

Access to worker file, s. 77.

Access to the worker's file was granted to the employer. [4 pages]

DECISION NO. 949/90 (19/12/90) Bigras Robillard Barbeau

Access to worker file, s. 77.

Access to the worker's file was granted to the employer. [3 pages]

DECISION NO. 558/89 (20/12/90) Strachan Cook Kowalishin

In the course of employment (horseplay) - Arising out of employment (horseplay).

The worker appealed a decision of the Hearings Officer denying entitlement for a knee injury. On the evidence, the worker suffered the injury during a snowball fight at work. However, there was evidence that snowball fights were a common occurrence during winter at this workplace. The Panel found that the horseplay leading to the injury was part of the general work environment. It was a regular occurrence and may have been condoned implicitly by the employer.

The appeal was allowed. The worker was entitled to benefits. [10 pages]

WCAT Decisions Considered: Decision No. 337 (1986), 2 W.C.A.T.R. 141; Decision No. 234/87 (1989), 10 W.C.A.T.R. 64;
Decision No. 771/87 (1987), 6 W.C.A.T.R. 247; Decisions No. 879/87, 1017/87

DECISION NO. 760/89 (20/12/90) McGrath Cook Jago

Delay (reporting injury).

The worker appealed a decision of the Hearings Officer denying entitlement for an upper arm injury. On the evidence, the worker was suffering from deltoid insertion tendonitis related to an accident when the worker was struck on the arm by a heavy basket. There was a delay in reporting the injury due to gradually increasing pain. The appeal was allowed. [5 pages]

DECISION NO. 930/90 (20/12/90) McGrath Rao Barbeau

Access to worker file, s. 77.

Access to the worker's file was granted to the employer. [3 pages]

DECISION NO. 27/90 (19/12/90) Faubert Higson Apsey

Continuity (of complaint) - Permanent disability.

The worker, a miner, injured his back in 1973. The next day his doctor diagnosed lumbar strain with scoliosis. Degenerative changes were noted. The worker returned to his regular work after four weeks. He did not seek further medical attention until a second similar injury in 1976. The worker reported this accident to his employer but did not claim compensation. On the same day as the second accident, he applied for lighter work as a watchman, which job he commenced a week later. In 1978 the worker began receiving regular medical attention for low back pain. In 1980 the worker fell down some stairs, suffering a low back contusion with marked hematoma. No time was lost from the watchman job. The worker did not seek further medical attention until he laid off from work in 1985.

The Appeal Board erred in relying solely on the lack of continuity of medical treatment. Co-workers and the worker's supervisor were aware of the worker's complaints of back problems from 1973 on. Treating physicians supported the worker's claim.

The Panel found that the worker was left with a permanent disability as a result of the first accident when he aggravated an asymptomatic condition. This condition was further aggravated by the second accident and it subsequently deteriorated. The worker's loss of wages after the second accident was permanent. Though there may have been an acute period of aggravation during which his disability may have been characterized as temporary, the lack of evidence made it impossible to assess that issue with confidence and it was best addressed through the application of the permanent disability provisions of the Act.

As the Board had denied entitlement it had not yet considered the quantum of pension benefits that would be appropriate. As the worker was now deceased, the Board was directed to do so on the basis of a review of the medical reports. [9 pages]

DECISION NO. 480/89 (20/12/90) Carlan Meslin Lebert

Penalties - Board Directives and Guidelines (penalty assessments) (distortions).

The employer appealed a penalty assessment for the years 1983-85. The employer submitted that its accident cost history was distorted by three large claims and that it was active in developing safety measures.

The company's costs were affected by three long term claims. This was not a reason to cancel the assessment. The company had been active previously in developing safety measures after a fatal accident in 1980. However, it had not instituted new programmes in recent years. The appeal was dismissed. [9 pages]

Regulations Considered: Reg. 951, s. 6

Board Directives and Guidelines: Additional Assessments Policies and Procedures, Board Minute 6, January 14, 1975, p. 4419

DECISION NO. 126/90 (20/12/90) Faubert Lebert Jago

Continuing entitlement - Consequences of injury (iatrogenic illness) (treatment) (TENS).

The worker suffered a shoulder strain in November 1984 and received benefits until May 1985. The worker appealed a decision of the Hearings Officer denying continuing entitlement for the shoulder condition and denying entitlement for headaches, eye problems and a neck disability.

The medical evidence did not support any continuing organic shoulder disability.

The worker related her other problems to treatment for the shoulder condition with a TENS unit by a physiotherapist in April 1985. The medical evidence did not support the existence of any organic disability, let alone one which was related to the TENS treatment.

The appeal was dismissed. [8 pages]

DECISION NO. 361/90 (20/12/90) Chapnik McCombie Jago

Mining (drilling) (long hole) - Vibrations (tools) - Pensions (Rating Schedule) (Taylor-Pelmeare scale) - White finger disease.

The employer appealed a decision which, in 1988, granted the worker a 2% pension for vibration-induced white finger disease. The worker began mining work with the accident employer as a long hole drill operator in 1960 and continued until 1968. In 1981 he returned to work as a long hole drill operator but he gave it up permanently in 1985.

The worker experienced blanching and numbness of the hands in the early 1960s. He first reported the condition in 1978. In 1979 a Board doctor concluded that the worker probably did have significant white finger disease in 1968, but that the condition had improved and was not interfering with the worker's daily life. Thus, no pension was recommended.

On the evidence, the Panel found that the worker was suffering from vibration-induced white finger disease. The Panel noted that use of hand vibratory tools, including long hole drills, resulted in vibration disease. The apparatus used by the worker involved bilateral manual contact on a steady and prolonged basis, particularly before 1981 by which time the controls had become more remote. The worker's condition was aggravated as a result of his return to employment as a driller in 1981. Though other factors, particularly his smoking habit, may have contributed to the worker's condition, his employment as a long hole driller constituted a significant contributing factor.

The worker's fingers turned white during the winter, particularly when the weather was damp. His impairment was described as slight to moderate as represented by stage one on the Taylor-Pelmeare chart. The Panel did not know how this assessment would translate into a disability rating and it was not in a position to assess the worker's residual disability at this time. However, the Panel did not accept the employer's submission that the worker's disability was minimal and should be rated at 0%. The employer's claim that the

assessment was improperly conducted and that it should be reduced from 2% was denied. The appeal was dismissed. [13 pages]

WCAT Decisions Considered: Decision No. 288 (1987), 4 W.C.A.T.R. 127; Decision No. 135/90 (1990), 14 W.C.A.T.R. 266; Decision Nos. 1183/87, 275/89

Board Directives and Guidelines: Claims Adjudication Branch Procedures Manual, Document no. 33-13-09; Claims Services Division Manual, s. 122(1), p. 262, Directive 15

DECISION NO. 709/90 (20/12/90) McGrath McCombie Howes

Supplements, older worker (age).

A 52 year old pipefitter appealed a decision of the Hearings Officer denying an older worker supplement. The Panel found that the worker's age was not a significant contributing factor to his unemployability or his inability to be retrained. The significant factors were the compensable disability coupled with depression, lack of training and lack of competence in English. The appeal was dismissed. [7 pages]

WCAT Decisions Considered: Decision No. 320/88 (1988), 9 W.C.A.T.R. 292; Decisions No. 196/90, 357/90

Board Directives and Guidelines: Claims Adjudication Branch Procedures Manual, Document no. 33-20-17

DECISION NO. 828/90I (20/12/90) Bradbury Robillard Chapman

Access to worker file, P.D. 1 - Access to worker file, P.D. 1 (offence).

The employer was appealing a decision of the Hearings Officer in which it was determined that the worker's knee disability was causally related to certain work incidents. The worker objected to the release of the Board's file material and of the Tribunal's Case Description to the employer. The Hearings Officer decision was dated September 1989. The worker claimed that in October 1989 she developed amnesia which covered the period in question in this appeal. She submitted that this would prevent her from responding to questions, instructing her representative or otherwise correcting statements prejudicial to her view of the events. The worker thus claimed that the prejudice to her in releasing the documents outweighed the relevance of the documents.

The Panel did not have to determine the factual question about the worker's amnesia. The circumstances of this case did not constitute prejudice sufficient to outweigh the relevance of the material. Without disclosure there could not be a fair hearing. The employer required the material to present its case and the Panel required it to reach a correct decision.

The worker was concerned that materials disclosed to the employer might be used in labour arbitration proceedings. Subsections 77(7) and 77(8) of the Act are broad enough to apply to Practice Direction No. 1 cases, such as this, to protect against the misuse of medical information by employers. [7 pages]

WCAT Decisions Considered: Decision No. 201 (1986), 2 W.C.A.T.R. 110; Decision No. 1083/87 (1988), 9 W.C.A.T.R. 181; Decision No. 754/89 (1989), 12 W.C.A.T.R. 263; Decision Nos. 143/88, 535/88I, 799/89, 875/89, 1175/89, 381/90, 429/90

Practice Directions Considered: Practice Direction No. 1 (1986), 1 W.C.A.T.R. 220

DECISION NO. 915/90I (20/12/90) Bigras Beattie Jago

Adjournment (referral to Board).

The worker was appealing denial of continuing benefits and a supplement. The Panel referred the case back to the Board to consider the issue of chronic pain. The hearing was adjourned. [4 pages]

WCAT Decisions Considered: Decision No. 915 (1987), 7 W.C.A.T.R. 1

DECISION NO. 44/90 (21/12/90) Starkman Fox Nipshagen

Medical examination (section 21).

The worker objected to a request by the employer to attend a medical examination. The employer had not applied for access to the worker file. It was possible that there would be no need for an examination after reviewing the file. Accordingly, the worker was not required to attend the examination. [4 pages]

WCAT Decisions Considered: Decision No. 185 (1986), 3 W.C.A.T.R. 110; Decision No. 1004/89

DECISION NO. 45/90 (21/12/90) Starkman Fox Nipshagen

Medical examination (section 21).

The worker objected to a request by the employer to attend a medical examination. The employer had not applied for access to the worker file. It was possible that there would be no need for an examination after reviewing the file. Accordingly, the worker was not required to attend the examination. [4 pages]

WCAT Decisions Considered: Decision No. 185 (1986), 3 W.C.A.T.R. 110; Decision No. 1004/89

DECISION NO. 882/90I (21/12/90) Sandomirsky Drennan Barbeau

Access to worker file, s. 77 (procedure, Board).

The employer appealed a decision of the Access Specialist to delete portions of four medical reports from the material released to the employer. These reports were listed in the Access Review Memo under the heading "Sensitive Reports and Results". They were also listed elsewhere in the Memo as being not relevant.

The Panel was concerned as to use of the term sensitive in the Memo. The Panel requested submissions from the Board to clarify the meaning of "Sensitive Reports and Results" and to address the relationship, if any, between that heading and the statutory criteria of "relevant" and "harmful". [4 pages]

WCAT Decisions Considered: 703/90

DECISION NO. 894/90 (21/12/90) Onen Beattie Jago

Bias - Chronic pain - Permanent disability - Maximal medical rehabilitation.

The worker suffered a neck and upper back injury in 1985. He received benefits until August 1986, when it was determined that he could return to regular work. He stopped work again in October 1986. In 1989, he was awarded a 20% pension for chronic pain retroactive to July 3, 1987. The worker appealed a decision of the Hearings Officer denying entitlement from August 1986 to July 1987.

In a preliminary matter, the Panel considered whether there was a reasonable apprehension of bias due to the fact that the worker's representative had been appointed as a Member of the Tribunal. The appointment was known at the time of the hearing but the representative would not be commencing her duties at the Tribunal for another two months. The employer voiced some discomfort with the situation but was not fundamentally concerned at the time of the hearing.

The Panel concluded that there was not a reasonable apprehension of bias. There was no existing relationship between the representative and the Panel. The expectation of a relationship was not sufficient to cause a likelihood of bias. However, the Panel recommended that the Tribunal set out clear and public rules as to when persons who have received appointments must cease to bring cases to the Tribunal.

On the merits, the Panel found that the worker was suffering from chronic pain in August 1986. There was no new accident in October 1986 when the worker laid off. Rather, the lay-off was just a further manifestation of the existing chronic pain.

The worker's condition was permanent by August 1986. There had been no significant change in reports of the worker's disability since 1985. Board policy allows for temporary benefits for six months. However, this is an administrative guideline and cannot form the basis of a decision as to when a worker is entitled to permanent disability benefits.

The Panel concluded that the worker was entitled to a pension for chronic pain from August 1986. The matter was referred back to the Board to determine the level of benefits. The appeal was allowed in part. [18 pages]

Board Directives and Guidelines: Chronic Pain Disability Policy, Board Minute 10, October 5, 1990, p. 5398

Cases Considered: Review of Decisions No. 915 and 915A (1990), 15 W.C.A.T.R. 245 (WCB Bd. of Directors)

DECISION NO. 82/901 (27/12/90) Kenny McCombie Preston

Continuity (of treatment) - Pensions (assessment) (arm).

The worker suffered a left arm injury in 1983 for which she was awarded a 3% pension. While at HRC in 1984, the worker fell, injuring her knee. The worker appealed a decision of the Hearings Officer denying an increase in the pension and denying continuing entitlement for her left knee/hip.

The worker's arm disability had been assessed by three Board doctors, all of whom agreed on the 3% award. There was no reason to interfere with their estimation of the impairment.

On the evidence, the worker suffered a knee injury at HRC in 1984. There was continuity of treatment and complaint. The worker was entitled to benefits for the knee disability. The Panel directed the Board to assess the worker for any permanent disability resulting from that injury. The Panel requested the Board to

consider the worker's complaints of a hip disability which she related to the fall at HRC. The Panel would make a final decision regarding the hip after considering the Board's views. The Panel also directed the Board to consider entitlement for a supplement after the pension level is established.

The appeal was allowed in part. [14 pages]

WCAT Decisions Considered: Decision No. 915 (1987), 7 W.C.A.T.R. 1

DECISION NO. 560/90 (27/12/90) Bradbury McCombie Nipshagen

Dependency benefits - Dependants (separation) - Words and phrases (dependants, s. 1(1)(f)).

The worker's wife appealed a decision of the Hearings Officer denying dependency benefits. The worker died in an accident in November 1984. The issue was whether the wife was partly dependent upon the worker's earnings.

The worker and his wife had been married for 30 years. In 1968, the wife returned to work, primarily because the family was in financial difficulty. In February 1983, the worker and the wife separated. By the summer of 1984, they were seriously considering a reconciliation. There was no formal separation agreement. The worker gave money to the wife as she needed it, about \$2,000 in total. The Panel accepted the wife's evidence that, although she could have managed without the money, she would have been financially constrained.

The Panel reviewed Canadian case law, which indicated that dependency is a mixed question of fact and law. In those cases, the courts made findings of partial dependency in the absence of a legal obligation to support and even though the parties could support themselves. The Panel also considered Decision No. 137/87 and the British cases it cited, in which the status of dependants was determined as a question of fact.

The Panel accepted the view of Canadian (and American) authorities that dependence was a question of mixed fact and law. The following three factors should be considered in determining dependency: 1) the legal obligation to support; 2) actual contributions to support; 3) reasonable expectation of support in the future. It is not necessary to find all three factors in any given case.

Applying these principles, the Panel found that there was a legal obligation to support, that the worker made an actual (although small) monetary contribution and that there was a reasonable expectation of reconciliation and future support. The wife was partly dependent on the deceased worker at the time of his death. She was entitled to dependency benefits under s. 36 of the pre-1985 Act. The appeal was allowed. [11 pages]

WCAT Decisions Considered: Decision No. 137/87 (1987), 5 W.C.A.T.R. 115; Decision No. 632/90

Cases Considered: Fisher v. CNR, [1940] 1 W.W.R. 583 (Sask. D.C.); Main Colliery Co. v. Davies, [1900] A.C. 358 (H.L.); Malec and Malec v. CNR, [1946] 2 W.W.R. 1069 (Sask. C.A.); New Monckton Collieries v. Keeling, [1911] A.C. 648 (H.L.); Newport Hotel Bond Company's Appeal, 89 Conn. 143; Wolfe v. CNR, [1934] 3 W.W.R. 497 (B.C.C.A.)

DECISION NO. 875/90I (27/12/90) Bradbury Robillard Clarke

Adjournment (notice) - Adjournment (additional medical evidence).

The worker was appealing a decision of the Hearings Officer denying entitlement for lung conditions which the worker related to exposure to asbestos.

The hearing was adjourned. The worker may have been exposed to asbestos with two prior employers. The Panel instructed Tribunal counsel to notify these employers of the hearing. The Panel also needed additional medical evidence from a s. 86h assessor. The Panel outlined some of the evidence regarding smoking and the work environment in order to assist the assessor. [6 pages]

DECISION NO. 927/90I (27/12/90) Bradbury B. Cook Apsey

Adjournment (Board submissions).

The employer was appealing a decision of the Hearings Officer reclassifying part of its business from Rate Group 405 to Rate Group 137. The Panel required additional information from the Board regarding its audit and classification policies and practices. The Panel requested that the Board send someone to assist the Panel when the hearing reconvenes. [4 pages]

DECISION NO. 702/90 (28/12/90) Hartman B. Cook Sutherland

Temporary disability (beyond pension level).

The worker suffered a herniated disc in 1985, for which he was awarded a 30% pension. The worker appealed a decision of the Hearings Officer denying temporary benefits subsequent to June 1988. On the evidence, the worker was not disabled beyond his pension level. The appeal was dismissed. [7 pages]

DECISION NO. 726/90 (28/12/90) McGrath Felice Meslin

Aggravation (preexisting condition) (osteoarthritis) (knee) - Benefit of the doubt.

The worker suffered compensable knee injuries in July 1987 and August 1987. He received benefits until January 1989 when he was discharged from HRC to regular work. Applying the benefit of doubt in favour of the worker, the Panel found that the accidents aggravated preexisting asymptomatic osteoarthritis and that the accidents were a significant contributing factor to the development of symptomatic osteoarthritis which continued subsequent to January 1989. The appeal was allowed. [11 pages]

DECISION NO. 832/90L (28/12/90) McGrath Lebert Barbeau

Leave to appeal (substantial new evidence) (medical report) - Leave to appeal (good reason to doubt correctness) (consideration of issue).

The worker suffered a back injury in 1976. The Board granted benefits on an aggravation basis. The worker applied for leave to appeal a decision of the Appeal Board denying benefits for lay-offs in 1977 and 1978.

A new medical report submitted by the worker constituted substantial new evidence. It was the only report by an orthopaedic surgeon. The report addressed the central issue and related the worker's disability to the compensable accident and not to a congenital condition.

There was also good reason to doubt the correctness of the Appeal Board decision. The Appeal Board failed to consider the lay-offs in 1977 and 1978 on a the disablement basis.

Leave to appeal was granted. [8 pages]

Board Directives and Guidelines: Claims Services Division Manual, s. 1(1)(a), p. 1, Directive 2; Interpretation Bulletin - Interpretation of "Personal Injury by Accident", "Chance Event", and "Disablement", Policy and Program Development Department, October 19, 1988

DECISION NO. 594/89LR (31/12/90) Marcotte Heard Jago

Reconsideration (procedural error) - Natural justice (opportunity to make submissions).

The worker requested reconsideration of Decision No. 594/89L, in which leave to appeal a decision of the Appeal Board was denied. One of the grounds for the leave application was that the worker was denied natural justice when the Appeal Board did not provide him with an opportunity to make submissions on a re-evaluation of his claim by the WCB Pension Section as directed by the Appeal Board. In Decision No. 594/89L, the Panel found that the worker's submission had merit but that it was common practice for the Appeal Board to proceed in this manner. The Panel concluded that the practice might have resulted in denial of due process but there was no evidence that the worker was discriminated against or treated unfairly.

The Panel reviewed Board memos and found that the worker had previously submitted his arguments to the Claims Review Branch and the Appeals Adjudicator. The Pension Section arrived at the same conclusion, and for the same reasons, as had previously been reached in prior decisions on the worker's submissions.

In this case, the omission of the opportunity to make submissions did not deprive the worker of the opportunity for a full hearing since his position had, on more than one occasion, been clearly placed for consideration and had been addressed explicitly by the Appeal Board. Accordingly, the worker had been treated fairly.

The request for reconsideration was denied. [7 pages]

WCAT Decisions Considered: 72R, 510/87R, 594/89L, 776/89L

DECISION NO. 937/90 (31/12/90) Kenny Klym Preston
Northway Communication Contracting Ltd. v. Bedard

Section 15 application - In the course of employment (contemporaneity).

The defendants in a civil action applied to determine whether the plaintiff's right of action was taken away. The defendants were the plaintiff's employer and the employer at the location where the plaintiff was injured.

The plaintiff's right of action was taken away against both defendants. He was a worker of a Schedule 1 employer in the course of employment at the time of the accident. The negligence of the workers of the other employer did not have to occur at the precise time the accident occurred.

The right of action of the plaintiff's family members against the plaintiff's employer was taken away. The Panel made no decision regarding their right of action against the other employer. If the other employer wanted to pursue this aspect of the application, the Panel would arrange to receive further written submissions. [9 pages]

WCAT Decisions Considered: Decision No. 84 (1986), 3 W.C.A.T.R. 38; Decision No. 965/871 (1988), 8 W.C.A.T.R. 214; Decision No. 432/88 (1988), 9 W.C.A.T.R. 306; Decisions No. 329, 1266/87, 185/88, 571/88, 136/89, 253/89, 755/89, 1000/89, 8/90, 291/90, 295/90
Cases Considered: Birch v. Seven Up (February 2, 1976) (Ont. Div. Ct.) (unrep.); Meyer v. WCB (Ontario) (1986), 15 O.A.C. 202; Silver v. WCB (February 14, 1984) (Ont. Div. Ct.) (unrep.); Ryan v. WCB (1984), 6 O.A.C. 33

DECISION NO. 356R (03/01/91) Strachan Fox Jewell

Reconsideration (new evidence) - Ombudsman.

The Appeal Board denied subsequent entitlement for a back condition on the basis that the disability was not related to an accident in August 1983. The worker applied for leave to appeal on the basis that the Appeal Board did not give sufficient weight to available evidence, particularly the results of a CAT scan in August 1984. In Decision No. 356, the Panel denied leave to appeal, finding that the Appeal Board considered the CAT scan and reports about it from the Board's surgical consultant. The worker objected to the Ombudsman. The Ombudsman requested that the Tribunal reconsider on the basis of new reports from an orthopaedic surgeon.

One of the new reports was actually available at the time of the hearing at the Tribunal. However, two later reports were not available. The Panel was satisfied that the three reports should be admitted and considered as a package.

The new evidence did not persuade the Panel that it would create a high probability of a different result. The initial opinion appeared adverse to the worker. Subsequent repeated inquiries by the Ombudsman resulted only in a qualified opinion based on a temporal connection, even though the doctor previously found the worker to be a poor historian.

The application for reconsideration was denied. [15 pages]

WCAT Decisions Considered: 72R apld, 72R2 apld, 356 consd

DECISION NO. 265/89 (03/01/91) Strachan Heard Jago*Permanent disability.*

The worker appealed a decision of the Hearings Officer denying a pension for a wrist disability. The worker suffered wrist pain from repetitive work and received temporary benefits for about one year. The worker had preexisting weak wrists. On the evidence, the worker's preexisting non-compensable condition was aggravated by her work. This aggravation resolved by the time benefits were terminated. The inability to return to repetitive work was a reflection of her normal physical limitations. The appeal was dismissed. [8 pages]

DECISION NO. 817/89I (03/01/91) Signoroni Felice Preston*Adjournment (Board submissions) - Pensions (assessment) (repetitive strain injury) (dynamic testing) - Epicondylitis.*

The worker suffered a finger injury for which he was awarded a 1% pension. He also received a 5% pension for epicondylitis. The worker appealed the quantum of the awards and the denial of an enhancement factor.

The key issue regarding the pension for epicondylitis was the manner of calculating pensions for repetitive strain injuries. The worker submitted that for such injuries, it was not sufficient to rely on static or one-shot tests. Rather, a correct assessment required dynamic or activity-oriented testing. The Panel was persuaded that this was a legitimate compensation question.

The Panel requested that the Board provide information regarding the manner in which it currently rates repetitive strain injuries, including the factors taken into account, any distinctions between repetitive strain injuries and other types of injuries, and the adequacy of impairment on activities of daily living as an indicator for repetitive strain injuries.

The hearing was adjourned. [23 pages]

Appendices: Submissions on relevance of dynamic testing for pension assessments of repetitive strain injuries

**DECISION NO. 485/90 (03/01/91) Onen B. Cook Preston
Willms v. Emilson***Section 15 application - Jurisdiction, constitutional (federal worker) - Jurisdiction, Tribunal (federal worker) (right of action) - Jurisdiction, Tribunal (section 15) (Government Employees Compensation Act).*

The defendant in a civil action applied under s. 15 to determine whether the plaintiff's right of action was taken away. The plaintiff and defendant were co-workers employed by the government of Canada at the time of a motor vehicle accident.

Any compensation the plaintiff may receive is provided for in the Government Employees Compensation Act (Can.). Section 4(1) of GECA sets out some of the entitlement conditions. Section 4(2) incorporates the

rates and conditions of compensation of the province in which the worker is employed. Section 4(3) states that compensation payable under s. 4(1) is to be determined by the board or other body established by the province where the worker is employed.

The Panel found that there were no constitutional issues raised in this application. Rather, the application raised a matter of jurisdiction, which required interpretation of the relevant sections of the Workers' Compensation Act and GECA. This was part of the Tribunal's usual responsibility and practice when it was required to decide how two pieces of legislation can be read together.

Section 4 of GECA does not incorporate provincial legislation in its entirety. The incorporation is limited to the rate and conditions of compensation. The Tribunal had to define its jurisdiction by considering which of the provincial provisions have been incorporated into GECA and which have not.

GECA has substantive provisions regarding legal action similar to those in the Ontario Act. However, GECA is silent as to any procedural provision to allow for an application by parties for a determination of their status. This silence could be interpreted as intended to incorporate the procedures set out in s. 15 of the Ontario Act or it could be interpreted as intended that status of parties would be determined by the court which would try the action.

GECA incorporates provisions of the Ontario Act that are conditions contemplated by s. 4(2) or, in other words, that are reasonably incidental to the question of entitlement. The jurisdiction to adjudicate on the right of action is not reasonably incidental to the compensation scheme incorporated by s. 4. Although s. 15 of the Ontario Act also provides for determination of the right to compensation, the predominant characteristic of the section is the relationship to civil action. There are valid policy provisions for such a provision. However, s. 15 is not necessary to the administration or adjudication of the rate and conditions of compensation. It is collateral to that system.

The Tribunal did not have jurisdiction to consider this application. [15 pages]

WCAT Decisions Considered: Decision No. 696/88 (1989), 10 W.C.A.T.R. 308 consd

Other Statutes Considered: Government Employees Compensation Act, R.S.C. 1985 c. G-5, ss. 4, 9, 11, 12

Cases Considered: Ching v. CPR, [1943] S.C.R. 451 consd

DECISION NO. 780/90I (03/01/91) McIntosh-Janis Ferrari Ronson

Chronic pain - Psychotraumatic disability.

The worker was in an accident in December 1974, for which he was awarded a 10% pension for a back disability and a 5% pension for a knee disability. In May 1984, he was in another accident, for which he was awarded an additional 5% pension for back disability. The worker appealed decisions of the Appeals Adjudicator and Hearings Officer denying entitlement for psychotraumatic disability and chronic pain.

The Board did not dispute the existence of a non-organic competent to the worker's disability. However, the Board denied entitlement apparently on the basis of preexisting vulnerability.

The Panel noted that the worker had three prior compensable accidents and that none of these injuries caused him to miss substantial periods of time from work. The claim for the non-organic condition was precipitated by the 1974 accident. The Panel found that the non-organic disability was related to the compensable accident. The Panel would decide on the quantum of the worker's pension after allowing submissions regarding the Board's new chronic pain policy. [10 pages]

WCAT Decisions Considered: Decision No. 915 (1987), 7 W.C.A.T.R. 1 apd

Board Directives and Guidelines: Chronic Pain Disability Policy, Board Minute 10, October 5, 1990, p. 5398

DECISION NO. 829/90 (03/01/91) McIntosh-Janis McCombie Barbeau

Exposure (formaldehyde) - Exposure (diphenyl) - Exposure (tetrahydronaphthalene).

The worker was exposed to chemicals and fumes at work in 1982. He received benefits from June 1982 to September 1982. The worker appealed a decision of the Hearings Officer denying continuing entitlement.

The worker was exposed to formaldehyde, diphenyl and tetrahydronaphthalene. His initial symptoms were nausea, stomach burning and shortness of breath. Over the years, his symptoms have become more severe and diffuse to include numbness, distorted vision, fatigue, chest pain, skin colour change, nerve pain and inability to tolerate fumes. In addition, after eating any food, he immediately falls into a deep sleep from which he cannot be roused.

The initial symptoms were diagnosed as formaldehyde poisoning. Some of the later symptoms resembled symptoms in a study of a group of workers exposed to diphenyl. However, the progression of symptoms did not fit within any classic diagnosis.

The Panel found that the exposure to chemicals was a significant contributing factor to development and progression of the worker's disability. There was strong evidence in favour of a relationship to work exposure. There was no persuasive evidence of a non-occupational cause. The possibility of synergistic reactions among the various chemicals could not be ignored.

The appeal was allowed. [10 pages]

DECISION NO. 890/90 (04/01/91) Bigras Rao Howes

Supplements, older worker.

A sewing machine operator suffered a low back strain in 1977, for which she was awarded a 10% pension. The worker appealed a decision of the Hearings Officer denying an older worker supplement from December 1988.

Considering the medical evidence, the worker's impairment of earning capacity was not significantly greater than is usual. Further, the worker was not totally disabled and could have returned to work. The appeal was dismissed. [8 pages]

DECISION NO. 932/90 (04/01/91) Signoroni Lébert Meslin

Recurrences (compensable injury) - Second accident.

The worker appealed a decision of the Hearings Officer that low back symptoms experienced after a fall in 1984 should be treated as a recurrence of a 1979 compensable condition rather than a new accident.

As a result of persistent submissions to the Board, the worker received 50% temporary partial disability benefits from 1979 to 1984, later increased to 75%. The submission that the symptoms in 1984 were not a

recurrence of the 1979 condition was not consistent with his position taken with the Board. Medical evidence supported a relationship to the 1979 accident. The appeal was dismissed. [6 pages]

DECISION NO. 805/87 (08/01/91) Strachan Beattie Nipshagen

Temporary disability (beyond pension level) - Psychotraumatic disability.

The worker suffered a compensable injury in April 1971. He was awarded a 10% pension for organic disability, later increased to 20%. The worker appealed a decision of the Appeals Adjudicator denying temporary total disability benefits from December 1984 to October 1986.

The worker was not entitled to benefits for psychotraumatic disability. He did not suffer from any significant psychiatric disability. Any non-organic disability was related to non-compensable personal matters that arose in 1985.

The worker was not disabled beyond his pension level. The reports of one doctor suggested that the worker was totally disabled but these reports were based on the complaints related by the worker. The appeal was dismissed. [13 pages]

WCAT Decisions Considered: 805/87I reld to

DECISION NO. 1154/87 (08/01/91) Signoroni Lebert Nipshagen

Chronic pain.

The worker suffered a low back injury in November 1980 and received benefits until February 1982. The worker appealed denial of benefits after February 1982.

There was extensive medical evidence that the worker continued to report a wide range of symptoms after February 1982. The worker suffered a minor injury but developed a very significant psychological condition. There were a number of personal factors that contributed to the worker's condition but it was the 1980 accident that precipitated the initial and ongoing aspects of the condition. The Panel was satisfied that the condition rendered the worker partially disabled.

The worker's symptoms could not be explained on an organic or psychiatric basis. The worker's degree of pain was inconsistent with organic findings. She was entitled to a pension for chronic pain disability. The matter was referred to the Board to determine the amount of the pension and its effective date. [15 pages]

WCAT Decisions Considered: 1154/87L reld to, 671/90I consid

DECISION NO. 55/89 (08/01/91) Moore Jackson Jewell

Continuing entitlement - Disc, degeneration (lumbosacral).

The worker suffered a low back strain in November 1954 in a compensable accident when he had to stop his

motorcycle suddenly. To stop the motorcycle, the worker had to twist his body sharply to the left and shift the weight of the motorcycle to the left side of his body. He was off work for two weeks. In 1956, the worker suffered a further back injury when he struck a pothole but benefits were denied. After increasing pain from 1971 to 1975, the worker underwent a laminectomy and discotomy. The worker appealed denial of further benefits.

The Panel accepted medical evidence that 1954 injury was the initial cause of his disability and that his later symptoms were compatible with the 1954 accident. The severity of the torsion trauma as applied to the lower back was not necessarily indicative of interbody disturbance.

The appeal was allowed. The worker was entitled to benefits for his low back condition subsequent to 1954. This would include the lay-offs in 1954 and 1975. [10 pages]

DECISION NO. 904/90 (08/01/91) Bradbury Higson Barbeau

Subsequent incidents (outside work).

The worker appealed a decision of the Hearings Officer denying entitlement for chiropractic care and related mileage expenses in 1987. The worker attended the chiropractor after a minor incident at home.

The worker suffered compensable accidents in 1982 and 1984. These accidents left the worker with a back condition that occasionally flares up. The minor incident at home was a flare-up of the back condition resulting from the compensable accidents. The appeal was allowed. [4 pages]

DECISION NO. 913/90 (08/01/91) Bradbury Robillard Nipshagen

Disablement (repetitive work).

The worker appealed a decision of the Hearings Officer denying entitlement for surgical removal of a giant cell tumour from the worker's hand. The worker related the tumour to the repetitive nature of his work.

There was no medical literature supporting a relationship between use of vibrating tools such as used by the worker and giant cell tumours. There was no evidence to suggest that the tumour was of traumatic origin. Further, the worker was able to return to work after surgery without any difficulty. The appeal was dismissed. [5 pages]

DECISION NO. 22/89 (10/01/91) Strachan Jackson Seguin

Supplements, temporary (wage loss) (part time work) - Significantly greater than is usual - Discretion, Board (supplements, temporary) (part time work) - Discretion, Board (rehabilitation) - Administrative Fund (transfer of costs).

The worker, while receiving full temporary supplementary benefits, found part-time employment.

Initially, he felt there was a good chance of full-time employment. Although his hours of work did increase, full-time employment did not develop. The worker continued to look for full-time employment while performing the part-time job and received a wage loss supplement during this time.

Normally, Board policy is to not pay a supplement where a worker is performing part-time work only, unless there is a reasonable prospect that it will lead to full-time employment. A Board counsellor advised the worker to leave the part-time job and to continue searching for full-time employment. After two weeks the worker returned to the part-time job. He eventually found full-time work.

The employer's objection to the payment of supplementary benefits was dismissed. The worker's wage rate changed from \$13 per hour to minimum wage. He could not perform his former or similar work due to physical limitations. His limited education and communication skills precluded finding comparable work. His impairment of earning capacity was thus significantly greater than usual. His cooperation with rehabilitation programs and his motivation to work were good.

The Board needs a broad discretion in the rehabilitation field to generate the flexible approach required. The exercise of that discretion was not unreasonable or incorrect. However, the Board's advice that the worker quit the part-time job and apply for a full supplement was incorrect. The employer thus was entitled to relief only for the amount of the additional supplemental benefits which the worker received as a result of the counsellor's instruction to discontinue the part-time employment. The employer should receive a credit for these costs which should be charged to the Administration Fund. [6 pages]

DECISION NO. 912/90I (10/01/91) Ellis Higson Barbeau

Chronic pain - Permanent disability - Maximal medical rehabilitation (chronic pain) - Board Directives and Guidelines (maximal medical rehabilitation) - Jurisdiction, Tribunal (final decision of Board) - Issue setting.

The worker suffered a back strain in April 1983, when he was 26 years old. The worker appealed a decision of the Hearings Officer denying entitlement to a pension. In a previous Hearings Officer decision, temporary benefits were denied subsequent to August 1984.

In a preliminary matter, the Panel adopted the broad view and found that it had jurisdiction to consider entitlement for chronic pain even though the Hearings Officer found only that the worker did not have an organic disability. Further, the Panel had jurisdiction to include the issue of entitlement to temporary benefits subsequent to 1984 even though the worker had not appealed formally on that issue.

Considering the worker's ongoing pain and the absence of organic or psychotraumatic medical findings, the Panel found that the worker was suffering from chronic pain or, possibly, fibromyalgia. Until additional medical information is obtained (which would affect the retroactivity of the award only), the Panel considered entitlement on the basis of chronic pain.

The worker's chronic pain condition related to the compensable accident. Accordingly, he was entitled to benefits from March 27, 1986, the retroactive date of the chronic pain policy.

According to Board policy, maximal medical rehabilitation (MMR) is achieved when further significant improvement in the worker's medical condition is unlikely. The Panel stated that the reference to the worker's "medical condition" must be a reference to conditions that are relevant to the pension rating process. In the case of a typical organic disability, it is the physical, functional restrictions caused by the disability's symptoms that impairs the earning capacity. In such a case, the point of maximum relevant

medical rehabilitation is the point where further significant improvement in these particular symptoms is unlikely. However, in chronic pain cases, there are two aspects of the worker's condition that are susceptible to medical rehabilitation treatment. One is the pain symptoms themselves, the other is the worker's capacity to cope with the symptoms. Therefore, in chronic pain cases, the medical rehabilitation activity contemplated by the MMR point, must include rehabilitation efforts directed at improving a worker's ability to live and work with his pain.

In this case, the worker was being treated for the first year for what was then thought to be an organic problem. After benefits were terminated, he was unable to earn a living, was evicted from his apartment, lived on the streets for some time and went on welfare. These events were obviously not conducive to learning to cope with a chronic pain condition. The Panel found that it had not been shown that there was no reasonable prospect of significant improvement. The Panel felt that the worker had considerable rehabilitation potential. In view of the time passed, it will take a renewed vigorous and appropriate medical and rehabilitation program for the worker to achieve some substantial additional recovery.

The Panel found that the worker had not achieved maximal medical rehabilitation. He was entitled to temporary total benefits from March 27, 1986, and to medical and vocational rehabilitation services. After MMR is achieved, the worker is entitled to be assessed for a pension. The Panel reserved its decision regarding fibromyalgia and entitlement prior to March 1986. [23 pages]

WCAT Decisions Considered: Decision No. 18 (1987), 4 W.C.A.T.R. 21 reld to; Interim Decision No. 24 (1986), 1 W.C.A.T.R. 93 reld to; Decision No. 206A (1989), 9 W.C.A.T.R. 4 apld; Decision No. 915 (1987), 7 W.C.A.T.R. 1 consd; Decision No. 915A (1988), 7 W.C.A.T.R. 269 reld to; Decision No. 669/87F (1989), 11 W.C.A.T.R. 54 reld to

Board Directives and Guidelines: Chronic Pain Disorder Policy, Board Minute 2, July 3, 1987, p. 5196;

Determining Maximum Medical Rehabilitation (MMR), Board Minute 3, July 10, 1990, p. 95

Cases Considered: Review of Decisions No. 915 and 915A (1990), 15 W.C.A.T.R. 245 (WCB Bd. of Directors) reld to

DECISION NO. 104/88 (11/01/91) McIntosh-Janis B. Cook Nipshagen

Aggravation (preexisting condition) - Climate (draught) - Procedure (resignation of Panel member).

The worker appealed a decision of the Appeals Adjudicator denying entitlement for accidents in 1982 and 1983.

After a hearing in 1988, a differently constituted panel requested additional medical evidence. Before considering that evidence and before reaching a decision, one of the panel members resigned. The parties agreed to have a new panel review the transcript and hear closing submissions.

The worker had a very vulnerable back, subject to flare-ups with minimal exertion. The Panel found that work activities were not a significant contributing factor to the onsets of back pain in April 1982 and November 1983. Further, the condition in 1982 was not caused by a draught. The worker was exposed to a draught for only a very short period of time. The appeal was dismissed. [8 pages]

WCAT Decisions Considered: 841/88 distd

**DECISION NO. 940/88 (11/01/91) Kenny Rao Nipshagen
Myers et al. v. Prokic**

*Worker (test) (business reality) - Worker (test) (organization test) - Worker (contract of service)
(employment relationship) - Independent operator (truck driver) - Transportation industry (truck driver) -
Supplier of motor vehicle, machinery or equipment - Section 15 application (remoteness).*

The plaintiff in a court action, and the defendant M, were involved in a motor vehicle accident.

M drove trucks, owned by T Ltd., but which pulled trailers owned by B Ltd. The applicable commercial vehicle licence was owned by B Ltd. M was paid a wage by T Ltd., based on the mileage driven. T Ltd. also made the standard employee deductions and paid WCB assessments with respect to M. M was a member of a union that had a collective agreement with B Ltd. B Ltd. had considerable control over the hiring and discipline of drivers supplied by T Ltd., since all of T Ltd.'s work was performed for B Ltd., however, M reported his absences from work to T Ltd. In these circumstances, M was an employee of T Ltd., rather than of B Ltd.

With the exception of a few deliveries for friends, the plaintiff had hauled materials exclusively for D Ltd. for 20 years. However, he considered himself an independent operator as he owned his own dump truck, held a commercial vehicle licence in his own name, paid all the expenses involved in operating the truck, D Ltd. did not pay his taxes or CPP, and he would have felt himself entitled to haul for others had D Ltd. ever not had enough work for him.

A decision of the Ontario Labour Relations Board had found the group of drivers at D Ltd. who did the same work as the plaintiff to be "dependent contactors" and thus "employees" under the Labour Relations Act. The fact that a person had been found to be an "employee" for collective bargaining purposes, did not necessarily mean that he was a "worker" for workers' compensation purposes. Ultimately that has to be decided under the Workers' Compensation Act.

Workers' compensation legislation is intended to provide coverage for those injured while working, regardless of whether they, their employers or third parties are at fault. Thus the extent to which an "employer" controls the work is less important than it is in "vicarious liability" cases where the employer is being sued for injuries caused by an employee to a third party. There are also problems with applying an "organization" test, since, for example, every service that a business pays for is to some degree "integrated" into that business.

In the workers' compensation context, it is important to look at the nature of the work that the person providing the service is performing and the nature of the business receiving it, and then to ask "whose business is it". Is the business of the person providing the service sufficiently separate that such person should be expected to provide his own protection against work injuries.

In this instance, the rights of D Ltd., under the collective agreement, were consistent with an employment relationship. The fact that D Ltd. had the right to control how the plaintiff performed his work was more important than the evidence about how little control D Ltd. actually exercised. The fact that the plaintiff had delivered exclusively for D Ltd. for 20 years, and that he was thus economically dependent on D Ltd., indicated that he was not carrying on a separate business. Although the plaintiff and his fellow drivers hauled only a small percentage of D Ltd.'s total tonnage, they formed an integral part of its business by providing a dependable pool of drivers to perform a specific type of delivery that other larger trucks were incapable of performing. The Panel thus found that the plaintiff was a worker under the Act.

As the plaintiff and M were both workers in the course of their employment at the time of the accident, s. 8(9) of the Act took away the plaintiff's right to sue both M and his employer, T Ltd.

Subsection 8(10) applies to the supplier of equipment, not the user of equipment. It thus did not apply to B Ltd., either in wording or intent. In this case, B Ltd. was not supplying the trailer to T Ltd. Instead, B Ltd. was the user of the tractor and driver supplied by T Ltd.

Before finding that s. 8(9) took away the plaintiff's right of action against B Ltd., the Panel would want to be satisfied that B Ltd. was sued in its capacity as an employer -- that B Ltd. workers would have been responsible for the negligent acts in the statement of claim (if such acts occurred). B Ltd. was granted 30 days within which it could provide further evidence or submissions on this point. [21 pages]

WCAT Decisions Considered: Decision No. 86 (1986), 2 W.C.A.T.R. 52 *reld to*; Decision No. 154 (1986), 1 W.C.A.T.R. 208 *reld to*; Decision No. 337 (1986), 2 W.C.A.T.R. 141 *consd*; Decision No. 423/88 (1988), 10 W.C.A.T.R. 216 *reld to*; Decision Nos. 320 *reld to*, 56/87 *reld to*, 422/87 *reld to*, 517/87 *reld to*, 1266/87 *apld*, 552/88 *consd*, 789/88 *apld*, 940/88 *reld to*, 961/88 *reld to*
Other Statutes Considered: Labour Relations Act, R.S.O. 1980, c. 228, s. 1(h)

Board Directives and Guidelines: Employer Assessment Policies Manual, Document No. 02-01-05

Cases Considered: Montreal (City) v. Montreal Locomotive Works Ltd. [1947] 1 D.L.R. 161 (P.C.) *consd.*;

Stevenson, Jordan, and Harrison Ltd. v. MacDonald and Evans, [1952] 1 T.L.R. 101 (C.A.) *consd*; Wiebe Door Services Ltd. v. M.N.R. (1986), 86 C.L.L.C. 12, 348 (Fed. C.A.) *consd*

DECISION NO. 123/90 (11/01/91) Kenny Robillard Nipshagen

Procedure (section 86o) (application at hearing) - Continuing entitlement.

The worker began to work in a corner store in 1976 and started to experience back pain in 1977. She did not lose any time until a compensable accident in September 1979. The Appeal Board granted benefits for the 1979 accident until January 1980. In 1982, the worker experienced further back problems for which she underwent a fusion. The worker appealed a decision of the Hearings Officer denying entitlement for the 1982 condition, which the Hearings Officer found was not related to the worker's work in 1976 and 1977.

At the hearing, the worker asked the Panel to grant leave to appeal the Appeal Board decision and to decide the appeal from that decision. The Panel decided to consider the application for leave since it was necessary in order to fully consider the worker's claim and there was no procedural impediment to doing so.

The work in 1976 and 1977 was not a significant contributing factor to the worker's condition in 1982. On the evidence, she had preexisting degenerative disc disease at L5-S1. The heavy work at the store caused the underlying condition to become symptomatic periodically but it did not change the underlying condition in any long term way.

On the basis of the evidence regarding the pre-1979 condition and new medical reports, the Panel granted leave to appeal the Appeal Board decision. On the merits, the 1979 accident injured a different part of the back than the previous problem. The 1982 problems resulted primarily from nerve root entrapment at L4-S. This level of disc injury resulted from the 1979 accident.

The appeal from the decision of the Hearings Officer was dismissed. The appeal from the decision of the Appeal Board was allowed. [12 pages]

DECISION NO. 918/90 (11/01/91) Starkman Drennan Apsey
Pepall v. Tankus

Section 15 application - In the course of employment (travelling).

The defendants in a civil case applied to determine whether the plaintiff's right of action was taken away. The issue was whether the plaintiff was in the course of employment at the time of a motor vehicle accident. The accident occurred when the plaintiff was returning after attending a business meeting at a client in Toronto. He was going to pick up his car at a garage and then return home.

The plaintiff was in the course of employment. The trip to Toronto was within the scope of his responsibilities. Following the visit, he would necessarily have to return to his place of employment or his residence, which was in the same general direction.

The plaintiff's right of action was taken away. [6 pages]

DECISION NO. 952/90 (11/01/91) McIntosh-Janis B. Cook Nipshagen

Continuity (of treatment) - Second accident.

The worker suffered a compensable back injury in January 1974 and received benefits for about three weeks. She appealed a decision of the Hearings Officer denying entitlement for lay-offs in 1977 and 1978.

Considering lack of continuity of treatment, the Panel found that the 1977 and 1978 lay-offs were not related to the 1974 accident. However, the lay-offs resulted from new accidents at work, for which the worker sought immediate medical attention. The appeal was allowed. [6 pages]

DECISION NO. 374/90R2 (14/01/91) Faubert Beattie Apsey

Reconsideration.

The worker requested reconsideration of Decision No. 374/90R. In Decision No. 374/90, the panel denied a commutation of the worker's pension. In Decision No. 374/90R, the panel denied a request for reconsideration. In that decision, the worker submitted a letter from a creditor indicating that his mortgage was in arrears and that the creditor hoped it would not be forced to take legal action. For this second reconsideration request, the worker submitted a further letter indicating a firm intention to start power of sale proceedings.

The request for reconsideration was denied. The Panel was aware of the prospect that the worker would be unable to maintain home ownership. However, the Panel was of the view that the worker would again fall into arrears even if the commutation were granted. Commutation would still not be in the worker's long term best interests. [4 pages]

WCAT Decisions Considered: Decision No. 95R (1989), 11 W.C.A.T.R. 1 reld to; Decisions No. 72R reld to, 72R2 reld to, 374/90 consd, 374/90R consd

DECISION NO. 740/90I (14/01/91) Moore B. Cook Barbeau

Psychotraumatic disability - Board Directives and Guidelines (psychotraumatic disability).

The worker suffered a compensable back injury in February 1985 for which she was awarded a 15% pension. The worker appealed a decision of the Hearings Officer denying entitlement for psychotraumatic disability.

The Panel found that the worker was suffering from a psychotraumatic disability. The worker had retreated into a state of invalidism. She suffered from anxiety, depression, social isolation and severe limitation in ability to perform the activities of daily living. These personality features preexisted the compensable accident or, at least, she had a predisposition in the form of a highly susceptible personality.

The Panel found that any predisposition was not disabling prior to the compensable accident and that work-related factors added to the preexisting condition in a significant way.

The worker met the requirements of the Board's psychotraumatic disability policy. The worker was entitled to benefits. The Panel would determine the nature of the benefits after receiving further submissions. [12 pages]

WCAT Decisions Considered: Decision No. 280 (1987), 6 W.C.A.T.R. 27 consd; Decision No. 386/90 apld
Board Directives and Guidelines: Claims Services Division Manual, s. 71(3), p. 207, Directive 22;
Operational Policy Manual, Document no. 03-03-03

DECISION NO. 892/90 (14/01/91) Faubert Ferrari Apsey

Suitable employment.

The worker suffered an upper back sprain in February 1988. In January 1989, he returned to his regular employment for half days. In February 1989, benefits were terminated when he refused to return for full days. The worker appealed a decision of the Hearings Officer denying further temporary benefits.

On the evidence, the worker's regular job was suitable even if he was temporarily partially disabled. The appeal was dismissed. [8 pages]

DECISION NO. 960/90 (17/01/91) Sandomirsky Cook Meslin

Recurrences (compensable injury).

The worker was entitled to benefits for a recurrence of her low back disability in September 1987.

The worker sustained a low back injury while lifting a tray in September 1980. She received benefits for various periods up to October 1983, at which time she was given modified duties. She remained on modified duties until her layoff in September 1987. The worker's job consisted mainly of sorting oversized letters into pigeon holes. In March 1987 the area covered by the pigeon holes was doubled by adding a second sorting case at a right angle to the first.

There was continuity of medical treatment between 1983 and 1987 by a family doctor, rheumatologist and

chiropractor. Given the worker's ongoing condition, the additional stretching and twisting required by the doubling of the sorting area aggravated the worker's condition. [5 pages]

WCAT Decisions Considered: Decision No. 32 (1986), 2 W.C.A.T.R. 1 ref'd to

DECISION NO. 524/89 (15/01/91) Strachan Robillard Nipshagen

Continuity (of treatment) - Consequences of injury (altered gait).

The worker suffered low back, neck, shoulder and foot injuries in 1969 and 1971. The worker appealed a decision of the Hearings Officer denying further temporary benefits for the back, neck and shoulder disabilities and denying an increase in the pension the worker received for the foot disability.

On the evidence, the worker was not disabled by the neck and shoulder conditions beyond the date of his return to work. He was not entitled to further benefits for those conditions.

There was no deterioration in the worker's foot condition from the time the pension was awarded in 1971 until it was increased in 1986.

The worker had a preexisting degenerative condition in the back. However, there was evidence that altered gait from the foot condition may have affected the condition. The worker was referred back to the Board for a pension assessment for the back condition.

The appeal was allowed in part. [9 pages]

DECISION NO. 986/89 (15/01/91) Strachan Fox Jewell

Continuing entitlement.

The worker suffered a knee injury in July 1983 and a groin injury in May 1984. The worker appealed a decision of the Hearings Officer denying continuing entitlement subsequent to January 1985. On the evidence, the worker was not disabled by knee, groin or back disabilities subsequent to January 1985. The worker's major condition during the period in question was urinary incontinence. The appeal was dismissed. [8 pages]

DECISION NO. 307/90 (15/01/91) Ellis Robillard Preston

Accident (occurrence) - Evidence (rejection of direct testimony) - Evidence (hearsay) - Credibility (interested witness).

The worker appealed a decision of the Hearings Officer denying entitlement for a back injury suffered in an unwitnessed fall.

Unsupported testimony from a party to an appeal can decide a case only where, after careful consideration of the testimony in light of the evidentiary context, the Panel is satisfied that it is probable that the testimony is true. In assessing the reliability of testimony, it is important to keep in mind that parties have a financial interest in persuading adjudicators to accept a particular view. The

credibility of interested witnesses cannot be gauged solely by personal demeanour. It must be consistent with the surrounding probabilities.

In this case, the only evidence of the fall was the worker's own testimony. The Panel could not accept the worker's testimony. The evidence taken together, and mostly established by hearsay, made a strong circumstantial case against the worker. The worker's story was out of harmony with the preponderance of probabilities suggested by the other available evidence. The Panel outlined the evidence on which it relied, including: the worker's explanation for lack of witnesses; statements by the worker's supervisor to a Board investigator; lack of a record of attendance at the nursing station on the day of the accident; medical reports indicating that the worker did not complain of back pain but, rather, of abdominal pain; medical reports which did not mention a fall until one month after the accident; failure of the worker to obtain a report from his family doctor, which, when obtained by the Panel, was found to be unsupportive.

The Panel noted the case of *Re Pitts and Director of Family Benefits Branch of the Ministry of Community & Social Services*, which could be interpreted as saying that direct testimony under oath can never be rejected by a tribunal in reliance on hearsay evidence, unless the tribunal first finds that the direct testimony was not creditable and gives reasons for that finding. A finding that testimony is not credible would have to be based on the nature of the witness' testimony, the manner of its presentation and any conflicts with the testimony of other witnesses.

If this is a correct interpretation of *Pitts*, the consequences would be dramatic, since the Tribunal relies significantly on hearsay evidence. The Panel found that it did not have to adopt this interpretation. On its facts, *Pitts* is a case in which the agency involved accepted hearsay evidence over direct testimony without any explanation. On those facts, it was not necessary for the court to hold that hearsay could never be preferred over direct testimony. It was only necessary to conclude that it could not be so preferred without sound cause.

The appeal was dismissed. [15 pages]

WCAT Decisions Considered: Interim Decision No. 2 (1986), 1 W.C.A.T.R. 7 consd; Decision No. 506/90 reld to

Cases Considered: *Faryna v. Chorny*, [1952] 2 D.L.R. 354 (B.C.C.A.) apld; *Phillips v. Ford Motor Co. of Canada Ltd.* (1971), 18 D.L.R. (3d) 641 (Ont. C.A.) reld to; *Re Pitts and Director of Family Benefits Branch of Ministry of Community & Social Services* (1985), 51 O.R. (2d) 302 (Div. Ct.) distd

DECISION NO. 821/90 (15/01/91) Sandomirsky McCombie Nipshagen

Hearing loss.

The worker appealed a decision of the Hearings Officer denying entitlement for hearing loss. On the evidence, the worker was exposed to noise for only two to three years before the onset of hearing loss. There was no evidence that the worker was exposed to a level of noise that could produce hearing loss in that time. Further, the worker's condition was not entirely typical of noise-induced hearing loss. The appeal was dismissed. [6 pages]

DECISION NO. 861/90 (15/01/91) Hartman Lebert Barbeau

Personal coverage (estimated earnings).

A worker with personal coverage appealed a decision of the Hearings Officer calculating his benefits on the basis of the statement of estimated earnings filed with the Board.

The worker was injured in February 1987. The worker requested an increase in his coverage sometime in February 1987. The worker was not a credible witness. The Panel could not accept that the worker had instructed his accountant to increase the coverage prior to the accident. The appeal was dismissed. [7 pages]

DECISION NO. 906/90 (15/01/91) Starkman Rao Chapman

Pensions (lump sum) (ten per cent pension) (advantage to worker).

The worker appealed a decision of the Hearings Officer denying payment in a lump sum of his 10% pension. The Board denied the commutation based on possible deterioration of his back condition. The Panel found that the worker had a minor residual disability. Although there is always a chance of deterioration, it had not been demonstrated on the balance of probabilities that this worker's condition would deteriorate. The appeal was allowed. [5 pages]

**DECISION NO. 908/90 (15/01/91) Hartman Robillard Chapman
Houndalas v. Stavropoulos**

Adjournment (representative availability).

An agent for the respondent's solicitor requested an adjournment of a s. 15 application on the basis of jury trial conflict, sickness, scheduled vacations and late delivery of materials.

The request for adjournment was denied. The Panel noted that the respondent had failed to file a respondent's statement. The hearing date had been set at the respondent's convenience. It appeared that the case involved a legal issue and not a factual dispute. The Panel could decide the case on the basis of the information and arguments presented. [5 pages]

DECISION NO. 929/90 (15/01/91) McGrath Rao Barbeau

Access to worker file, s. 77.

The employer appealed denial of access to two documents. The issue in dispute was SIEF. One of the documents was a memo relating to a prior accident. This was potentially relevant and should be released to the employer. The other document was a direct deposit slip, which was not relevant. The appeal was allowed in part. [3 pages]

DECISION NO. 132/90 (16/01/91) Moore Higson Apsey

Issue setting - Scope of hearing (where leave granted) - Hearing loss - Tinnitus - Board Directives and Guidelines (hearing loss) (presbycusis factor) - Apportionment (pensions).

The worker appealed a decision of the Appeal Board denying entitlement for tinnitus and confirming a 6.4% pension for hearing loss. In Decision No. 132/90L, the Panel granted leave, finding that there was good reason to doubt the correctness of the Appeal Board decision concerning tinnitus. The Panel found that it was not limited to considering the tinnitus issue. Having found an error on part of the Appeal Board, the leave Panel ordered a hearing de novo. This is consistent with s. 86o.

The worker was 60 years old when his claim for hearing loss was accepted in 1973. By 1984, there had been a deterioration in the worker's hearing. There is a presbycusis factor in the Board policy for hearing loss which requires deduction of .5 decibels for every year a worker's age exceeds 60. Applying this factor, there was no change in the adjusted hearing loss.

In applying the presbycusis factor, the Board is, in effect, saying that there is present in the hearing loss of an older worker a separate injuring process not related to the compensable accident. This appears consistent with the Board's general policy of apportioning entitlement to permanent benefits where a non-compensable condition can be identified and measured. The Board adopted the presbycusis factor as a guideline for measuring a particularly common non-compensable injuring process.

The Board was correct in confirming the hearing loss pension.

Regarding tinnitus, the Panel found that the condition was severe and met the requirements of the Board guidelines. The worker was entitled to a 2% pension for tinnitus.

The appeal was allowed in part. [8 pages]

WCAT Decisions Considered: Decision No. 756 (1988), 8 W.C.A.T.R. 64 consd; Decision No. 915 (1987), 7 W.C.A.T.R. 1 consd; Decisions No. 629 consd, 132/90L reld to

Board Directives and Guidelines: Claims Services Division Manual, s. 122, p. 270, Directive 19

Cases Considered: Re Union Gas Co. of Canada Ltd. and White (1970), 2 O.R. (2d) 85 (Ont. C.A.) consd

DECISION NO. 331/90 (16/01/91) Kenny McCombie Barbeau

Leclair v. Despres

Section 15 application (motor vehicle insurance) - Jurisdiction, Tribunal (section 15) (initial entitlement) - In the course of employment (overtime).

The plaintiff in a civil case applied to determine whether he has a right to compensation under the Act. Since the defendant was not a worker of a Schedule 1 employer, the plaintiff's right of action was not taken away. The purpose of the application was to determine whether the plaintiff was entitled to no fault insurance benefits.

Section 15 provides that a party may apply to the Tribunal for a determination of the right to compensation. The Board was not an appropriate forum to decide the question since the worker has an election and may not want to claim benefits. An action against the insurer for non-payment of benefits could also result in a s. 15 application. The Panel decided that it would determine whether the plaintiff has a right

to compensation. The Panel noted that any benefits the worker could receive would still be decided by the Board.

The plaintiff was injured in a motor vehicle accident while making deliveries for the employer after hours using the company truck. He was not paid overtime. The Panel found that the worker was in the course of employment and would be entitled to benefits. [10 pages]

WCAT Decisions Considered: Decision No. 1249/87 (1988), 8 W.C.A.T.R. 300 *reld to*; Decisions No. 514/87 *reld to*, 105/89 *reld to*, 1025/89 *reld to*

Other Statutes Considered: Insurance Act, R.S.O. 1980 c. 218, Schedule C

Cases Considered: *Bragagnolo v. MacIvor* (1981), 35 O.R. (2d) 364 (Ont. H.C.) *reld to*; *Madill v. Chu* (1976), 71 D.L.R. (3d) 295 (S.C.C.) *reld to*

DECISION NO. 823/90 (16/01/91) Moore Higson Apsey

Jurisdiction, Tribunal (final decision of Board) - Withdrawal (of appeal).

The worker was appealing a Hearings Officer decision which denied her entitlement under a special rehabilitation assistance program. Before the Tribunal, she also wanted to put in issue the termination of her wage loss supplement.

The special rehabilitation program was presumably developed by the Board under s. 54 of the Act, while the wage loss supplement would have been paid under either s. 40 or s. 45 of the pre-1989 Act. Entitlement under these sections raises substantially different issues, particularly where a special program has been developed under s. 54. The Hearings Officer and the Decision Review Branch addressed policy requirements specifically devised for the special rehabilitation program.

Therefore, the Board had not made a final decision concerning entitlement to the wage loss supplement and the Panel could only consider the question of the worker's entitlement to the special rehabilitation program. The Panel granted the worker's request to withdraw her appeal without prejudice to bringing it back before the Tribunal once the Board had rendered a decision on the other issues raised by the worker. [4 pages]

Board Directives and Guidelines: Vocational Rehabilitation Division Manual, Document No. 05-01-01

DECISION NO. 931/90 (16/01/91) Robeson Robillard Preston

Access to worker file, s. 77 (subsequent disclosure).

Access to the worker's file was granted to the employer. The Panel noted the new Board policy regarding protection of workers' identities in documents released to the employer and subsequently disclosed to others by the employer. [4 pages]

Board Directives and Guidelines: Operational Policy Manual, Document no. 01-04-11

DECISION NO. 6/91 (16/01/91) Onen Rao Chapman

Access to worker file, s. 77 (deletion of material) - Access to worker file, s. 77 (issue in dispute) (relevance) - Case Direction Panel.

The employer appealed a decision that part of a medical opinion by a Board doctor should be withheld from the employer.

The employer's objection to the level of SIEF relief that it had received in this case constituted a valid issue in dispute. The medical opinion in question was in the form of an eight-line, hand-written memorandum which expressed the doctor's opinion as to whether there was a preexisting condition which could lead to SIEF relief. The Board deleted five lines from the memorandum in the materials released to the employer.

Only the deleted part of the memo addressed the question of preexisting factors which might enhance the disability. This was central to the issue in dispute with respect to SIEF and thus was relevant. The deleted part formed the basis for the doctor's opinion that the preexisting condition was minor.

The worker did not provide any evidence as to why the particular phrase that he objected to was offensive to him. The phrase was not a medical term in the strictest sense, but it is used by doctors and lawyers to describe a particularly vulnerable individual. In this case the term was used by a medical practitioner to describe the state of the worker on a question relevant to the subject matter of the memorandum. The words deleted by the Board were relevant and were not prejudicial. Therefore the medical opinion in question ought to be released to the employer in its entirety. The employer's appeal was allowed.

On a preliminary matter, the Panel clarified the procedure to be followed when the assistance of a Case Direction Panel (CDP) is required. When Tribunal counsel is merely seeking instructions from a CDP, this ought not to be disclosed either to the parties or to the Hearing Panel. If any party is dissatisfied with the conduct of the case by Tribunal counsel, then the matter can be raised with the Hearing Panel.

When preliminary matters must be decided by means of a CDP prior to an oral hearing, it is essential that the parties be advised that a CDP is to consider the issue. They must be afforded an opportunity to make submissions and to know the submissions and other materials before the CDP. Subsequently, both parties must be provided with a decision, including written reasons. [6 pages]

DECISION NO. 923/90 (17/01/91) Robeson Robillard Apsey

Notice of hearing - Withdrawal (of appeal).

The worker suffered a compensable accident in 1983 while employed by Employer A. He was appealing a 1988 decision that denied him benefits subsequent to 1986 with respect to the 1983 accident. The worker was injured in 1987 while working for Employer B. The worker was also appealing a 1989 decision that denied him benefits subsequent to July 1987 with respect to the 1987 accident.

Employer A's position was that it would argue that, if there was a causal relationship between the worker's disability and his employment, such disability related to his employment with Employer C in 1984 and 1985, rather than with his employment with employer A in 1983. Employer C had not been notified of any of the proceedings dealing with the worker's claims. The worker took the position that the evidence and submissions with respect to the 1988 decision should be dealt with before moving on to the evidence and

submissions pertaining to the 1989 decision.

The Panel could not proceed with the worker's appeals in view of the worker's employment with an employer who had not been involved in any of the proceedings, as that employment might be important to the determination of the worker's appeals.

The worker's request to withdraw the appeals of both the 1988 and 1989 decisions was granted. The worker could go to the Board for a determination respecting his employment with employer C. The parties could then appeal any or all of the decisions to the Tribunal. [4 pages]

DECISION NO. 933/90 (17/01/91) Moore Higson Chapman

Significant contribution (of employment to disablement) - Disablement (change in work).

The worker claimed that her work as a spray painter gradually aggravated her pre-existing degenerative disc disease so that it amounted to an accident in the form of a disablement under s. 1(1)(a)(iii) of the Act. The worker indicated to the Board that her condition developed in late 1978 when the work changed from painting small picture frames to painting large pieces of furniture which she had to lift. The worker was admitted to hospital for her back condition in May 1979.

In determining whether disablement arose out of the employment, the appropriate question was whether there was an injuring process associated with the employment that made a significant contribution to the worker's disability.

The Panel found that the worker in fact began to exhibit symptoms which were evidence of the disabling nature of the preexisting degenerative condition, in 1977, rather than in late 1978. The worker's employment activities neither initiated the degenerative changes, nor gave rise to an injuring process that accelerated or added to the preexisting degenerative condition. The worker's job was made more difficult by the developing degenerative condition, but there was no evidence that the degenerative disc disease resulted from the employment. The worker's appeal was dismissed. [7 pages]

WCAT Decisions Considered: Decision No. 280 (1987), 6 W.C.A.T.R. 27 apld; Decision No. 565 (1987), 4 W.C.A.T.R. 238 apld; Decision No. 652/87 (1988), 10 W.C.A.T.R. 75 apld; Decision No. 26/90 (1990), 15 W.C.A.T.R. 120 reld to

DECISION NO. 964/90 (17/01/91) Sandomirsky Beattie Barbeau

Access to worker file, s. 77.

The employer appealed denial of access to certain information in the worker's file. The issue in dispute was SIEF. The information related to the worker's common law spouse and was not relevant to the issue of the worker's preexisting organic or psychological condition. The appeal was dismissed. [3 pages]

DECISION NO. 965/90 (17/01/91) Sandomirsky Beattie Barbeau

Access to worker file, s. 77.

Access to the worker's file was granted to the employer. [3 pages]

DECISION NO. 972/90 (17/01/91) Moore McCombie Jago

Medical examination (section 21).

The employer applied for an order requiring the worker to attend a medical examination. The worker had been examined extensively by Board doctors and he had already submitted to one examination by a doctor of the employer's choice. The Panel found that the available evidence was sufficient to allow the employer to participate fully in the adjudication of the claim. The application was denied. [4 pages]

WCAT Decisions Considered: Decision No. 174 (1986), 2 W.C.A.T.R. 96 reld to; Decisions No. 19/87 reld to, 658/88 reld to

DECISION NO. 269/89 (18/01/91) Strachan Klym Guillemette

Penalties.

The employer appealed a decision of the Hearings Officer confirming a penalty assessment for the years 1983-85. The employer had previously been assessed a penalty for the years 1980-82. It had implemented a safety program. The Panel found that the concerns of equity should prevail so that an unfair share of the accident cost burden should not be transferred to other employers in the rate group. The appeal was dismissed. [8 pages]

WCAT Decisions Considered: 256/87 apld

Regulations Considered: Reg. 951, s. 6

Board Directives and Guidelines: Additional Assessments Policies and Procedures, Board Minute 6, January 14, 1975, p. 4419

DECISION NO. 263/89R (28/01/91) Hartman McCombie Apsey

Reconsideration.

The worker requested reconsideration of Decision No. 263/89 in which the worker claimed entitlement for a knee condition in 1982 which he related to an accident in 1966. New evidence submitted by the worker did not add significantly to the evidence considered by the Panel. The request was denied. [6 pages]

WCAT Decisions Considered: Decision No. 95R (1989), 11 W.C.A.T.R. 1 reld to; Decisions No. 72R reld to, 72R2 reld to, 263/89 consd

DECISION NO. 661/90 (22/01/91) Hartman Robillard Ronson

Accident (occurrence) - Aggravation (preexisting condition) (hernia).

The worker appealed a decision denying entitlement for a hernia. The worker was a porter. She claimed that a preexisting hernia was aggravated by lifting at work in April 1984.

The Panel was not satisfied that an incident occurred at work, considering inconsistencies in the worker's evidence. Further, the worker did not meet the requirements of Board guidelines since the worker's hernia was not incarcerated or irreducible. The appeal was dismissed. [8 pages]

Board Directives and Guidelines: Operational Policy Manual, Document no. 03-03-15

DECISION NO. 847/90 (22/01/91) Hartman B. Cook Barbeau

Supplements, temporary (wage loss) (period of adjustment) - Discretion, Board (supplements, temporary) - Transitional provisions (commencement).

The worker suffered a back injury in 1977 and was awarded a pension. He returned to part time work at a much lower rate of pay. He received a supplement or temporary benefits from 1980 to 1988. The worker appealed a decision of the Hearings Officer denying a temporary supplement subsequent to November 1988.

Board policy regarding temporary supplements changed at the end of 1987. The policy prior to 1987 recognized post-accident wage loss. After 1987, the policy focused on whether a worker was likely to benefit from rehabilitation. It provided for a period of adjustment for return to work, usually of three to six months.

It appeared that the Board interpreted its new policy as a maximum entitlement of six months, without considering the individual circumstances. The Panel found that the Board did not apply its discretion reasonably. The worker had been at his job for several years without complaint by the Board. The worker was entitled to the supplement until July 26, 1989, at which time s. 45(5) of the pre-1989 Act ceased to apply. The appeal was allowed. [7 pages]

WCAT Decisions Considered: Decision No. 915 (1987), 7 W.C.A.T.R. 1 reld to; Decision No. 466/89 (1989), 11 W.C.A.T.R. 369 reld to; Decision No. 729/89 (1989), 12 W.C.A.T.R. 251 apld; Decision No. 916/89 (1989), 12 W.C.A.T.R. 279 apld; Decision No. 746/89 apld
Board Directives and Guidelines: Policy on Supplementary Benefits under s. 45(5) of the Act, Board Minute 1(a), November 16, 1987, p. 52; Addendum to s. 45(5) Policy, December 3, 1987

DECISION NO. 952/89 (23/01/91) Bigras B. Cook Ronson

Stress (effect of disciplinary action).

The worker appealed a decision of the Hearings Officer denying entitlement for stress. The worker worked on an assembly line for an automobile manufacturer. The worker was having trouble coping with a new job. There was a meeting between the worker, his foreman and his union committeeman. At the meeting, the

foreman criticized the worker's work habits and his personal hygiene. The worker became very agitated, left the office and did not return to work for close to three months. For the first three weeks, he stayed at home in a depressed state and refused to see anyone.

Prior Tribunal decisions about stress dealt with gradual onsets of disability. This case deals with an acute onset of disability. The worker had a predisposition to being depressed but had been able to come out of these prior bouts without medical assistance.

There was medical evidence of an acute anxiety reaction to a situational crisis. The disability was set off by the events at work. The worker was entitled to benefits. The appeal was allowed. [11 pages]

WCAT Decisions Considered: Decision No. 918 (1988), 9 W.C.A.T.R. 48 *reld to*

DECISION NO. 316/90 (23/01/91) Bigras Lebert Seguin

White finger disease - Mining (drilling) (long hole) - Vibrations (tools).

The worker appealed a decision of the Appeals Adjudicator denying entitlement for white finger disease. The worker was a miner. He used stoper and jack leg drills from 1969 until 1972. From 1972 to 1976, he used a long hole drill. He began to notice symptoms in 1978.

The worker did not meet the requirements of the Board guidelines of two years exposure to vibratory tools immediately preceding the onset of symptoms. Further, the exposure while using the long hole drill was not the type of exposure that produces high frequency rapid acceleration vibration. In addition, the medical evidence did not establish that the worker's condition was white finger disease.

The appeal was dismissed. The Panel made no findings regarding the possibility of carpal tunnel syndrome but recommended that the issue of carpal tunnel syndrome be addressed by the Board. [10 pages]

Board Directives and Guidelines: Claims Services Division Manual, s. 122(1), p. 262, Directive 15

**DECISION NO. 276/90 (24/01/91) Kenny Klym Jewell
DeWitt v. Lisicky**

Section 15 application - In the course of employment (lunch) - In the course of employment (travelling).

The defendants in a civil case applied to determine whether the plaintiff's right of action was taken away. The issue was whether the plaintiff was in the course of employment at the time of a motor vehicle accident.

The plaintiff was a sales manager. He spent more than half his time out of the office. On the day of the accident, the employer asked the plaintiff to deliver a package. After delivering the package, the plaintiff went home for lunch. While returning from lunch to the office, the plaintiff was involved in the accident. He did not usually go home for lunch due to distance but did on this occasion since the delivery was in the area of his home.

The Panel found that the worker was in the course of employment at the time of the accident. He was at the accident site because he was returning to work after delivering the package. Although he had lunch

before returning to work, he would not have had lunch where he did had he not been required to deliver the package.

The plaintiff's right of action was taken away. [8 pages]

WCAT Decisions Considered: Decision No. 44 (1986), 2 W.C.A.T.R. 8 reld to; Decisions No. 321 reld to, 389 reld to, 485 reld to, 597/87 reld to, 817/87 reld to, 1288/87 reld to, 21/88 reld to, 174/88 reld to, 571/88 reld to, 62/89 reld to, 669/89 reld to

DECISION NO. 464/90 (24/01/91) Carlan B. Cook Seguin

Chronic pain - Pensions (assessment) (chronic pain).

The worker fell 25 feet in an accident in May 1980. He was awarded a 5% pension for a right wrist disability. The worker appealed a decision of the Hearings Officer denying entitlement for right shoulder, right hip and low back disabilities.

The Board was correct in limiting entitlement for organic disability. However, the Panel found that the worker was suffering from chronic pain. The Board did not consider this since it did not grant benefits for chronic pain at the time.

Considering the level of frustration exhibited by the worker, the Panel decided to continue adjudication of the claim and finalize the process. The worker continued to be physically active but in a diminished capacity. The Panel found that the worker came within Category 1 of rating schedule for chronic pain. The worker was entitled to an additional 10% pension retroactive to March 1986, when entitlement for this condition was first recognized. [7 pages]

Board Directives and Guidelines: Operational Policy Manual, Documents No. 03-03-03, 03-03-06

DECISION NO. 807/90 (24/01/91) Bigras Robillard Seguin

Supplements, temporary (wage loss) - Rehabilitation, vocational (cooperation).

The worker suffered a back injury in 1978 for which he was awarded a 10% pension. He returned to employment in 1981 at a wage loss and received a wage loss supplement. The worker appealed a decision of the Hearings Officer denying the supplement subsequent to January 1989, when the Board found that the worker refused to participate in a rehabilitation program.

The Panel found that the worker did not refuse to cooperate with rehabilitation. The worker had been holding his present job for seven years and was apprehensive about leaving that job to participate in a full-time rehabilitation program, after which there would be no guarantee of obtaining suitable employment. He entered into correspondence with the Board to explain his position but received no comment from the Board until termination of the supplement.

The appeal was allowed. The worker was entitled to continuation of the supplement until July 1989 when the Act was amended. [17 pages]

Board Directives and Guidelines: Addendum to s. 45(5) Policy - Administrative Guidelines on the Work Adjustment Supplement, Policy and Program Development Department, December 3, 1987

DECISION NO. 427/89 (25/01/91) Strachan Felice Guillemette

Apportionment (standard of proof) - Transfer of costs - Negligence - Discretion, Board (apportionment) (standard of review).

A municipality contracted with a construction company to construct a storm sewer. the construction company discovered an abandoned branch of a water main, of which the municipality had been unaware. The abandoned water main had to be cut and plugged. An employee of the construction company was injured while capping the abandoned water main when a length of pipe broke away and shifted, apparently due to air pressure in the main. The municipality appealed a decision of the Hearings Officer transferring the costs of the accident to it from the construction company.

The standard of review of the Board's discretion under s. 8(9) was correctness. A higher standard of reasonableness was applied in some prior Tribunal decisions. This higher standard would apply only where the Board had a unique expertise. This was not the situation in this case where the transfer of costs is founded upon an allegation of negligence.

The normal standard of proof applied to determine negligence. The Panel found that there was negligence on the part of the municipality. Only the municipality was in a position to know the actual state of affairs. The municipality advised that the line was abandoned and dead. That information was misleading. Since the municipality was negligent, the Panel had to consider whether the construction company was also negligent. The Panel found that the construction company was negligent. It specialized in this type of work. It should have realized that information regarding the water main, which had been abandoned for about 50 years, was not totally reliable. It could have taken extra precautions.

The Panel apportioned the negligence at 70% to the municipality and 30% to the construction company. The Panel left it to the Board to allocate costs. The appeal was allowed in part. [15 pages]

WCAT Decisions Considered: Decision No. 112 (1986), 3 W.C.A.T.R. 54 distd; Decision No. 46/87 (1989), 4 W.C.A.T.R. 319 distd; Decision No. 716/87 (1987), 6 W.C.A.T.R. 242 not folld; Decision No. 213/88 not folld
Board Directives and Guidelines: Employer Assessment Policies Manual, Document no. 03-05-00

DECISION NO. 886/90 (25/01/91) Starkman Lebert Ronson

Chronic pain - Pensions (assessment) (chronic pain).

The worker appealed a decision of the Hearings Officer denying entitlement for psychological disability or chronic pain resulting from a compensable accident in August 1984.

The medical reports indicated that the worker was suffering from pain and that the pain was causing severe life disruption. The Panel found that the worker was entitled to a 10% pension for chronic pain retroactive to March 27, 1986. [7 pages]

WCAT Decisions Considered: 894/87 reld to
Board Directives and Guidelines: Operational Policy Manual, Document no. 03-03-03

DECISION NO. 924/90 (25/01/91) Sandomirsky McCombie Ronson

Vibrations (tools) - Mining (drilling) (jack leg) - Aggravation (preexisting condition) (disc, degeneration) (cervical).

The worker was a jack leg driller for 18 years. He appealed a decision of the Hearings Officer denying entitlement for cervical degenerative disc disease.

The medical evidence supported a relationship between the worker's exposure to vibratory tools and an aggravation of a degenerative disc condition. The Board's reason for denying the claim was lack of continuity of treatment and complaint. The Panel found sufficient evidence of continuity. The appeal was allowed. [7 pages]

DECISION NO. 20/91 (25/01/91) McIntosh Janis B. Cook Preston

Access to worker file, s. 77.

Access to the worker's file was granted to the employer, except for a portion of one report which was not relevant. [3 pages]

DECISION NO. 21/91 (25/01/91) McIntosh Janis B. Cook Preston

Access to worker file, s. 77.

Access to the worker's file was granted to the employer. [3 pages]

DECISION NO. 1009/89 (28/01/91) Bigras McCombie Clarke

Chronic obstructive lung disease - Bronchitis - Emphysema - Exposure (coal dust) - Exposure (silica dust) - Smoking.

The worker appealed a decision of the Hearings Officer denying entitlement for chronic obstructive pulmonary disease. The worker was a cook on lake freighters. During the off-season, he worked in a steel foundry. He claimed that his condition resulted from exposure to coal dust on the boats and to silica dust at the foundry.

The Panel found that the worker was exposed to coal dust on the ships from 1944 to 1967. However, the exposure was secondary to his employment due to its location. The exposure was not continuous and was not at levels comparable to those involved directly in the mining or transportation of coal. The worker was exposed to silica dust during the off-seasons from 1948 to 1981, for a total of about 8 years. The worker was a heavy smoker, smoking about 15 cigarettes a day for 40 years, by his own admission.

The worker had chronic bronchitis and severe bullous panacinar emphysema. Lung biopsies did not indicate any unusual collection of dust. The Panel accepted evidence that the absence of any other

pneumoconioses, traces of dust or fibrosis and silicosis, eliminated the possibility that the worker's obstructive lung disease was treated to exposure to mineral dusts.

The Panel concluded that work exposure was not a significant contributing factor to the worker's condition. The Panel noted that smoking was the only identifiable significant contributing factor in this case. The appeal was dismissed. [19 pages]

WCAT Decisions Considered: Decision No. 915 (1987), 7 W.C.A.T.R. 1 reld to; Decision No. 94/87 (1989), 11 W.C.A.T.R. 20 reld to; Decision No. 809/88 reld to

DECISION NO. 109/90 (28/01/91) Strachan Robillard Preston

Supplements, temporary - Suitable employment.

The worker suffered a knee injury for which he was awarded a 7% pension. The worker appealed a decision of the Hearings Officer denying entitlement to a supplement.

The worker returned to work as a fork lift operator but stopped after about 45 minutes because he was unable to perform the job. The employer offered alternate employment as a checker, but the worker refused it. The Panel found that this job was within the worker's capabilities. The worker refused suitable work. He was not entitled to the supplement. The appeal was dismissed. [6 pages]

DECISION NO. 338/90 (28/01/91) Bigras Klym Jago

Exposure (N-hexane).

The worker appealed the denial of benefits for a disability characterized by symptoms of headaches, dizziness, blurred vision, balance instability, weakness and nausea which he claimed to be related to exposure to toxic substances in the course of his employment. He worked for a firm which produced cans for the food processing industry. Tests conducted in 1985 showed excessive levels of N-hexane in some areas of the plant but not in the worker's area.

The worker suffered an onset of dizziness, weakness and excessive sweating while at work in July 1981. He saw his physician and hypertension (high blood pressure) was diagnosed. He had a history of hypertension. The worker claimed that these symptoms never left him. He returned to work after a short lay-off in 1981 and continued to work intermittently until January 1985 when he laid off permanently because of the above-mentioned symptoms. The worker underwent extensive physical and psychiatric testing. The only impairment revealed by the testing was a minor psychomotor dysfunction.

The Panel found that there was no causal relationship between the worker's exposure to organic solvents at work and his disability. Exposure to N-hexane would cause peripheral neuropathy which was never diagnosed in the worker at any time. Exposure to solvents would produce an insidious onset preceding the development of persistent symptoms, while this worker experienced a sudden onset of symptoms. The expected reversal of symptoms did not occur after the initial onset, even though the worker was employed for only short periods after 1981 and not at all after 1985.

Most significant was the disproportionately low level of impairment revealed by the medical testing.

There were no signs of memory impairment, nerve conduction or sensory weakness that would be expected to be found in a person exposed to the concentration of organic solvents required to produce the level of disability experienced by the worker. The appeal was dismissed. [24 pages]

WCAT Decisions Considered: Decision No. 890/88 consid

DECISION NO. 537/90L (28/01/91) McGrath B. Cook Clarke

Leave to appeal (good reason to doubt correctness) (Appeal Board procedure) - Leave to appeal (good reason to doubt correctness) (Board procedure).

The worker applied for leave to appeal a decision of the Appeal Board denying continuing entitlement for a low back injury.

There was good reason to doubt correctness of the Appeal Board decision. The worker was not given an opportunity to respond to a post-hearing medical report that played a role in the decision. This report may have been central enough to the decision that failure to obtain submissions constituted good reason. However, in any event, there were two other matters, which were not of themselves sufficient to constitute good reason but which taken together with the failure to obtain submissions, constituted good reason to doubt correctness of the Appeal Board decision. These two matters were the bypassing of a level of appeal and an incorrect statement that the worker had returned to her pre-accident state.

Leave to appeal was granted. [6 pages]

WCAT Decisions Considered: Decision No. 533L (1987), 5 W.C.A.T.R. 73 reld to; Decisions No. 494 reld to, 736L reld to, 813 reld to, 2/87L reld to, 308/87L apld, 693/87L reld to, 102/88L reld to, 581/88L apld, 842/88L reld to, 132/90L reld to

DECISION NO. 864/90 (28/01/91) Chapnik Robillard Chapman

Continuing entitlement - Aggravation (preexisting condition) (disc, degeneration) (cervical).

The worker suffered a head and neck injury in October 1984. She appealed a decision of the Hearings Officer denying continuing entitlement subsequent to October 1985.

The worker suffered from preexisting cervical degenerative disc disease. On the evidence, the accident was not a significant contributing factor to the worker's condition subsequent to October 1985. It was the preexisting and progressive degenerative condition that was the primary cause of her continuing difficulties.

The appeal was dismissed. [6 pages]

WCAT Decisions Considered: Decision No. 915 (1987), 7 W.C.A.T.R. 1 reld to

DECISION NO. 872/90 (28/01/91) Stewart Felice Jago

Rehabilitation (aid in getting worker back to work) (fitness club membership) - Medical treatment (special) (fitness club membership) - Health care (fitness club membership) - Subsequent incidents (outside work) - Words and phrases (health care services, s. 52(2)) - Words and phrases (necessary, s. 52(2)).

The worker sought total temporary benefits for a period in February and March of 1988 and reimbursement for membership in a fitness club.

The worker related the 1988 lay-off to a compensable back injury sustained in September 1977. He had previously received temporary benefits for periods in 1977, 1978, 1985, and 1987 for recurrences which were found to be related to the 1977 injury. In 1986 he was assessed at the 15% level for a pension.

The worker was entitled to benefits for the 1988 lay-off even though it followed a slip at home. The home accident involved twisting, exactly the type of injury that the 1986 pension assessment report stated would exacerbate the compensable condition. There was also evidence of continuing back problems corroborated by the employer. The home accident was a minor event and the 1977 accident remained a significant contributing factor to the worker's disability.

The worker was not entitled to reimbursement for membership in the fitness club under ss. 23, 52 or 54.

The requirement in s. 23 that the club membership be "the only means of avoiding heavy payment for a permanent disability" was not met.

The explicit listing and definition of "health care services" in s. 52(2) indicated that other services were to be excluded. Health club membership thus was not a health care service under s. 52(2). A whirlpool or a particular piece of equipment at a club may fall within the ambit of "appliances or apparatus" as referred to in s. 52(2). However, the use of the equipment at the club was not "necessary as a result of the accident" pursuant to s. 52(2), even though it may have been of benefit to the worker's condition. The worker joined the club two years prior to receiving a note from his doctor suggesting that the Board pay for the worker's membership in a club.

Both s. 54 and Board policy also refer to "necessary" items or expenditures. They therefore did not cover the membership fee either. [8 pages]

Board Directives and Guidelines: Operational Policy Manual, Document No. 01-04-03 (deleted, no longer applicable)

DECISION NO. 874/90 (28/01/91) Chapnik Lebert Meslin

Supplements, temporary - Impairment of earning capacity.

The worker suffered a head and back injury in 1983 while working as a doughnut maker. He received a 10% pension for post-traumatic neurosis. The worker appealed a decision of the Hearings Officer denying a temporary supplement to the pension subsequent to April 1987.

A job assessment with a doughnut shop in February 1987 was terminated because the worker was making too many mistakes. In April 1987, the worker started working unpaid in a restaurant. This lasted for two weeks. The Board terminated the worker's supplement on the basis that his impairment of earning capacity was not significantly greater than is usual since he demonstrated his ability to work in the restaurant.

The worker was not capable of working in the doughnut shop. The work in the restaurant was for a short

period only and the nature of the work involved unpaid training. The restaurant did not intend to hire the worker. This arrangement did not demonstrate a lack of impairment of earning capacity.

The Panel found that the worker met the threshold test for a supplement. He was not disqualified on the basis of cooperation or availability. He was entitled to the supplement from April 1987 to July 26, 1989. The appeal was allowed. [7 pages]

WCAT Decisions Considered: Decision No. 915 (1987), 7 W.C.A.T.R. 1 apd

Board Directives and Guidelines: Operational Policy Manual, Document no. 05-03-06

DECISION NO. 900/90 (28/01/91) Stewart Beattie Meslin

Temporary partial disability - Availability for employment (job search).

The worker suffered a torn meniscus in October 1986. She appealed a decision of the Hearings Officer denying full benefits from May 1988 to January 1989.

On the evidence, the worker continued to be partially disabled during the period in question as a result of the compensable accident. Preexisting arthritis and obesity did not prevent the worker from performing her job prior to the accident.

The worker was not disentitled from receiving full benefits. Although she advised the Board that she was unable to look for work, she was basing that on the understanding that she had to physically attend the premises of a specific number of employers. This understanding was sincerely held. She had also advised the Board that she wanted to return to work and that she agreed with the restrictions suggested by the Board doctor. During the period in question, she continued to be seen by her own doctors and to carry on a weight loss program.

The appeal was allowed. [7 pages]

DECISION NO. 925/90 (28/01/91) Starkman McCombie Howes

Suitable employment.

The worker suffered a knee strain in July 1986. He returned to modified work in September 1987 but claimed he was unable to perform the work. The worker appealed a decision of the Hearings Officer denying benefits subsequent to September 1987.

On the evidence, the modified work was extremely light. The worker did not make much of an effort to perform the job. The Panel found that the worker was not available for suitable work. The appeal was dismissed. [5 pages]

DECISION NO. 935/90I (28/01/91) Sandomirsky Beattie Jago

Adjournment (additional medical evidence) - Dupuytren's contracture.

The worker appealed a decision of the Hearings Officer denying entitlement for Dupuytren's contracture, which the worker related to his work as a bricklayer.

A different panel of the Tribunal was reviewing the relationship between manual labour and Dupuytren's contracture. It was going to hear evidence from an expert in the field.

The Panel directed the Tribunal Counsel Office to obtain a transcript of this expert testimony. After reviewing the transcript and the worker's submissions, the Panel would determine what further steps, if any, would be required before reaching a decision. [5 pages]

WCAT Decisions Considered: 710 reld to, 98/87 reld to, 795/87 reld to, 300/88 reld to, 434/88 reld to

DECISION NO. 956/90I (28/01/91) Stewart McCombie Barbeau

Adjournment (referral to Board).

The worker was appealing a decision of the Hearings Officer confirming his pension level. At the hearing, the worker indicated that he was also appealing decisions denying entitlement for chronic pain and psychotraumatic disability. These issues had been dealt with at the Claims Adjudicator level only at the Board. The hearing was adjourned so that the worker could pursue these issues at the Board. [3 pages]

WCAT Decisions Considered: 487/89I apld

DECISION NO. 1/91 (28/01/91) Robeson Robillard Nipshagen

Access to worker file, s. 77.

Access to the worker's file was granted to the employer, except for certain information which was not relevant. [3 pages]

DECISION NO. 3/91 (28/01/91) Robeson Robillard Nipshagen

Access to worker file, s. 77.

Access to the worker's file was granted to the employer, except for certain information which was not relevant. [4 pages]

DECISION NO. 612/90 (29/01/91) Bigras Drennan Clarke*Continuity (of symptoms) - Carpal tunnel syndrome.*

The worker was injured when she slipped in February 1983. She received benefits for neck and shoulder injuries. The worker appealed a decision of the Hearings Officer granting only 50% benefits from February 1987 to January 1988 and denying entitlement for carpal tunnel syndrome. The Board reduced benefits in 1987 because it found that the worker was partially disabled as a result of non-compensable carpal tunnel syndrome and terminated benefits in 1988 because she was totally disabled by the carpal tunnel syndrome.

The Panel found that the carpal tunnel syndrome was related to the compensable accident. There were references in the medical reports dating back to 1983 regarding pain and numbness in the hand. From February 1987 to January 1988, the worker was partially disabled by a combination of the compensable neck and shoulder injuries and the compensable carpal tunnel syndrome. She was not disentitled from receiving full benefits. The determination of benefits subsequent to January 1988 was referred to the Board. The appeal was allowed. [12 pages]

DECISION NO. 951/90 (29/01/91) Starkman Ferrari Meslin*Supplements, older worker.*

The worker suffered an arm injury in 1977 for which she was awarded an 8% pension in December 1979, increased to 20% in September 1980. In 1987, she was awarded a 10% pension for psychotraumatic disability. The worker appealed a decision of the Hearings Officer denying an older worker supplement from December 1979 to April 1985.

Section 43(5) of the pre-1985 Act provided for temporary supplements. Board policy during the period in question provided for payment of supplements to employees approaching age 65 who were not likely to obtain suitable employment.

In this case, the worker was age 58 in 1979. The Panel was satisfied that the worker's impairment of earning capacity was significantly greater than is usual and that she was an older worker. Considering her age, education and the work she had been doing, the Panel was satisfied also that it was unlikely that she would benefit from rehabilitation.

The worker was entitled to the supplement. The appeal was allowed. [5 pages]

Board Directives and Guidelines: Claims Adjudication Branch Manual, Document no. 33-20-02

DECISION NO. 971/90 (29/01/91) Moore Robillard Jago*Medical examination (section 21).*

The employer applied for an order requiring the worker to attend a medical examination.

There was a valid compensation goal and the examination was important to achieving that goal. However, the employer had sent a letter to the doctor. This letter had a detailed summary of materials from the

worker's file and a list of questions to be answered by the doctor. A previous request by the employer for a medical examination had been denied in Decision No. 209/90 since the letter sent to the doctor would likely result in a report which could not carry any significant weight.

Since an examination intrudes so significantly on the worker's privacy, it should have the greatest possible probative value. The probative value of the examination is undermined when the doctor has been presented with an adversarial reading of the previous medical evidence. The letter in this new application was a modified version of the prior letter. The summary portion of the letter consisted of statements and references designed to support the employer's position. The employer has the right to bring this material to the attention of the doctor and to ask for an opinion but it is more appropriate that this be done after the doctor has seen the worker.

The worker was directed to attend an examination by a doctor other than the one who received the letter. In arranging the examination, the employer could provide the doctor with the list of questions, which help the doctor to structure the examination, but not the other material. The employer may send the Case Description materials to the doctor, provided that it is free of commentary. [5 pages]

WCAT Decisions Considered: Decision No. 174 (1986), 2 W.C.A.T.R. 96 reld to; Decision No. 209/90 (1990), 14 W.C.A.T.R. 304 consd; Decisions No. 19/87 reld to, 658/88 reld to

DECISION NO. 33/91 (29/01/91) Onen Higson Apsey

Disability (disabled from working) - Suitable employment.

The worker was a courier who suffered a back injury in March 1988. He returned to modified employment in August but laid off again in October. The worker appealed a decision of the Hearings Officer denying entitlement for the lay-off in October.

The worker stated that his condition did not change appreciably during his absence from work in October. He returned to work after threat of dismissal and did not indicate any significant consequences to his back when he returned. Medical evidence did not indicate any objective basis for the worker's complaints. In addition, the Panel noted that the worker was also working on a regular basis in a real estate office.

The Panel found that the worker was partially disabled but that he was not disabled from performing the modified work. The worker failed to perform suitable work which was offered at his regular rate of pay. Therefore, he was not entitled to benefits. [12 pages]

DECISION NO. 579/89 (30/01/91) Strachan B. Cook Preston

Hearing loss - Meniere's disease - Benefit of the doubt.

The worker's job involved working at a forge in high noise areas. The worker first began complaining of hearing problems in 1972. Bilateral Meniere's disease, a non-compensable condition, was suspected from the beginning.

In 1978, the Board paid for the worker's hearing aid. Though the worker's left ear hearing loss (40 db) was thought to be due to a non-compensable vestibular disturbance, the benefit of the doubt was given to the

worker with respect to the right ear hearing loss (25 to 30 db). The left ear was treated as if the same amount of hearing loss that was experienced in the right ear was attributable to noise exposure, while the balance was due to the non-compensable condition. The worker's hearing continued to deteriorate in both ears after 1978. In 1986 the loss was measured at 70 to 80 db in each ear.

The worker was not entitled to a pension for the deterioration in his hearing since 1978, because, on the preponderance of evidence, it was attributable to Meniere's disease. The benefit of the doubt did not apply as the evidence was not approximately equal. [8 pages]

DECISION NO. 226/90. (30/01/91) Faubert Robillard Apsey

Worker (test) (organization test) - Independent operator.

The employer was a heating and plumbing company. The company president's brother was hired to do renovation work to the company premises. The employer appealed a decision of the Hearings Officer that the brother was a worker within the meaning of the Act.

Determining the true nature of the relationship between the company and the brother was more difficult in this case because the transaction was not at arms length. The service provided by the brother was not part of the regular business of the company. The brother submitted an invoice to the company in which he billed the company for work performed by persons other than himself. He determined his own hours and did not request payment of wages on a regular basis. The involvement of the president in the renovation process did not indicate an employment relationship. Rather, he was showing a natural interest in renovations that he planned.

The Panel concluded that the brother was an independent operator. The appeal was allowed. [11 pages]

WCAT Decisions Considered: Decision No. 86 (1986), 2 W.C.A.T.R. 52 consd; Decision No. 154 (1986), 1 W.C.A.T.R. 208 consd; Decision No. 226/89 (1989), 11 W.C.A.T.R. 307 consd

DECISION NO. 706/90 (30/01/91) Sandomirsky Felice Meslin

Health care (attendance allowance) - Rehabilitation (attendance allowance) - Discretion, Board (attendance allowance).

The worker appealed a decision of the Hearings Officer denying entitlement for an attendance allowance. The worker was born with spina bifida. She began work with the accident employer in 1978. In 1984, her hours of work were increased by one hour per day. She developed pressure sores as a result of the increased time that she was confined to her wheelchair. She received benefits for the pressure sores as well as for a resulting psychological disability in the form of panic and anxiety attacks and loss of self-esteem. The worker was now almost totally bedridden. She was totally dependent on her husband for medical, hygiene and psychological needs. She had not yet been assessed for a pension.

The worker submitted that she was entitled to an attendance allowance under ss. 52(1)(a), 52(1)(c) or 54. Under s. 52(1)(a), the worker argued that she needed health care benefits in the form of the attendance allowance and that s. 52(1)(c) provided for such treatment for totally permanently disabled workers but did

not preclude it for totally temporarily disabled workers. Under s. 52(1)(c), the worker argued that "permanent total disability" meant total functional disability and not that the worker has been awarded a 100% pension. Under s. 54, the worker argued that an attendance allowance would assist in lessening and removing her handicap.

Section 52 defines a worker's right to benefits, while s. 54 gives the Board discretion to make expenditures which may assist in lessening a handicap. Section 54 applies to workers with temporary as well as permanent disabilities. It was not necessary in this case to make a determination under s. 52. The Panel found that this was a case in which the discretion under s. 54 should be exercised. The attendance allowance was a service which would lessen the worker's physical and psychological handicaps.

Although the Board had not considered the claim under s. 54, the Panel did not refer the case back to the Board in the circumstances. The Panel exercised the Board's discretion and awarded the attendance allowance. The appeal was allowed. [13 pages]

WCAT Decisions Considered: Decision No. 95 (1986), 2 W.C.A.T.R. 61 consd

Board Directives and Guidelines: Claims Services Division Manual, s. 52(1)(c), p. 174, Directives 1 and 3; Operational Policy Manual, Document no. 06-01-07

Other Statutes Considered: Interpretation Act, R.S.O. 1980 c. 219, s. 10

**DECISION NO. 936/90 (30/01/91) Starkman Robillard Apsey
Fogarasi et al. v. Riordan**

Section 15 application - In the course of employment (proceeding to and from work).

The plaintiff in a court action was employed as a commission salesperson. She was required to report at the office every morning by 8:00 before starting out to meet clients. She did not receive any compensation for the operation of her vehicle but she clearly required the vehicle to sell the product. She was involved in a motor vehicle accident while driving to the office.

The plaintiff was not in the course of her employment at the time of the accident. The normal rule, that workers travelling from home to work and back are not in the course of employment, applied in this case. The worker was required by the employer to report to the office each morning and she was travelling from home to work when the accident occurred.

This was not a case where the worker was required, by the employer, to bring an automobile to work. She did not have to drive to the morning meetings at the office. The fact that the worker required a vehicle to perform her sales work was not sufficient to set aside the application of the normal rule. [8 pages]

Cases Considered: Smith v. Workmen's Compensation Appeals Board (1968), 447 P. 2d, 265 (Cal. S.C.) distd; Gautreaux v. Life Insurance Co. of Georgia (1972), 256 So. 2d 3832 (La. App.) distd; Hinojosa v. Workmen's Compensation Appeals Board (1972), 104 Cal. Rptr. 456 (S.C.) reld to; Shafran v. Board of Education (1966), 269 N.Y.S. 2d 593 (NYSC) reld to; Lutgen v. A. Conte Electrical Inc. (1975), 374 N.Y.S. 2d 434 (S.C.) reld to; Blackley v. City of Niagara Falls (1954), 130 N.Y.S. 2d 77 (S.C.) reld to

DECISION NO. 2/91I (30/01/91) Robeson Robillard Nipshagen

Access to worker file, s. 77.

Access to the worker's file was granted to the employer, except for several words in one document which were not relevant, and three illegible documents about which the Panel would decide after receiving legible copies. [4 pages]

DECISION NO. 34/91 (30/01/91) Signoroni Beattie Nipshagen

Access to worker file, s. 77.

Access to the worker's file was granted to the employer. [3 pages]

DECISION NO. 35/91 (30/01/91) Signoroni Beattie Nipshagen

Access to worker file, s. 77 - Withdrawal (of appeal).

The employer was appealing a decision to deny access to material in one document. The appeal was withdrawn after the employer conceded that it did not require additional evidence to pursue its claim. [3 pages]

DECISION NO. 400/90 (31/01/91) Chapnik Lebert Seguin

Continuity (of treatment).

The worker suffered low back injuries in December 1969 and January 1970. The worker appealed a decision of the Hearings Officer denying entitlement for continuing back disability.

The worker had preexisting degenerative disc disease. There was a lack of continuity of treatment from 1972 to 1982. The Panel found that the compensable accidents were not a significant contributing factor to his condition after benefits were terminated in February 1970. The appeal was dismissed. [6 pages]

DECISION NO. 811/90 (31/01/91) Chapnik Drennan Preston

Supplements, temporary - Suitable employment.

A brickmason suffered a low back injury in 1978 for which he was awarded a pension. He received a temporary supplement for various periods subsequent to 1982. The worker appealed a decision of the Hearings Officer denying the supplement subsequent to December 1988.

The worker's impairment of earning capacity was significantly greater than is usual. Modified work as a janitor was not suitable. The worker had continued to work during much of the time since 1982 and, thus, it appeared that the supplement served a rehabilitative purpose.

The appeal was allowed. The worker was entitled to the supplement from December 1988 to July 26, 1989. [6 pages]

WCAT Decisions Considered: Decision No. 915 (1987), 7 W.C.A.T.R. 1 reld to; Decision No. 124/88 (1988), 9 W.C.A.T.R. 231 reld to; Decision No. 212/88 (1988), 9 W.C.A.T.R. 248 reld to; Decision No. 349/88

DECISION NO. 827/90 (31/01/91) Chapnik Drennan Nipshagen

Standing (rate group) - Intervenor - Disablement (repetitive work).

The worker appealed a decision of the Hearings Officer denying entitlement for a right shoulder disability.

In a preliminary matter, the Panel dealt with a request to appear of the personnel manager of the defunct accident employer. His present company was a significant member of the accident employer's rate group, to which the costs of the claim would be charged. He was attending on behalf of the rate group. After discussion, the Panel decided to grant intervenor status without the right to cross-question witnesses but with the right to make submissions.

On the evidence, the Panel found that the worker's shoulder condition was a disablement from the nature of the workers' repetitive work. The appeal was allowed. [8 pages]

DECISION NO. 657/90 (01/02/91) Moore McCombie Jago

Supplements, temporary (rehabilitative purpose) - Rehabilitation, vocational (job search) (geographic location) - Rehabilitation, vocational (considering self totally disabled) (Canada Pension Plan) - Discretion, Board (supplements, temporary).

The worker appealed a decision denying him entitlement to a temporary supplement on the grounds that he did not cooperate with a vocational rehabilitation program which would have aided him in returning to work and that he had effectively removed himself from the workforce by declaring himself to be totally disabled.

The worker, whose only trade skill was as a cement mason, was unable to continue performing such work due to his back injury, for which he was receiving a 15% pension. He was aged 50 at the time that the supplement was requested and he had limited proficiency in English. The worker's reduction in earning capacity was significantly greater than it would be for the average worker with a 15% disability.

To the extent that the worker displayed an attitude of only "going through the motions" of cooperating with his vocational rehabilitation counsellor, it reflected the lack of advice and assistance received from the Board. The worker pursued the limited opportunities that were available in his small town. The counsellor imposed an arbitrary search target that was unrealistic in light of the limited opportunities. The counsellor also wanted the worker to extend his search area to other communities. It was reasonable for the worker to request that relocation be tied to a solid job offer, to insist that relocation be tied to some

form of retraining, or to insist that he not be forced to relocate at a time when he was unable to sell his house. Therefore, the Panel found that the worker did not fail to cooperate with a rehabilitation program which would have aided in returning him to work.

Statements by the worker and his doctors that the worker was incapable of work, or was unemployable, had to be taken in context. They did not necessarily say anything about the attitude of the worker towards vocational rehabilitation. The worker was still in contact with his rehabilitation counsellor and was making regular job applications when some of the statements were made. The worker's receipt of Canada Pension Plan benefits was based on his difficulty in finding any kind of employment as well as his medical disability. The worker requested retraining from the Board on several occasions but was always turned down. Therefore, it could not be said that the worker was not cooperating with a vocational rehabilitation program because he and his attending physicians considered him to be unemployable.

The Board has a discretion to refuse supplementary benefits where no rehabilitative purpose would be served by the benefits. The two factors to be considered in determining whether there is a rehabilitative purpose are the prospects of the worker returning to work and whether the worker would benefit from vocational rehabilitation. While a worker can be found to have failed to cooperate with vocational rehabilitation even when a program has not been explicitly offered to the worker, it is a different matter to conclude that the worker will not benefit from vocational rehabilitation when no suitable program has in fact been offered, or has even been seriously considered by the Board.

Where the worker has met all the other pre-conditions for entitlement to a temporary supplement, under s. 43(5) of the pre-1985 Act, the Board should exercise its discretion in favour of the worker where there is little or no evidence that the worker would be unlikely to return to work or would be unlikely to benefit from a vocational rehabilitation program. The appeal was allowed. [14 pages]

WCAT Decisions Considered: Decision No. 915 (1987), 7 W.C.A.T.R. 1 reld to; Decision No. 124/88 (1988), 9 W.C.A.T.R. 231 reld to; Decision No. 212/88 (1988), 9 W.C.A.T.R. 248 distd; Decision Nos. 236/88 apld, 349/88 reld to, 802/88 apld

DECISION NO. 697/90 (01/02/91) Sandomirsky Furhman Preston

Access to worker file, s. 77 (issue in dispute) (SIEF) - Access to worker file, s. 77 (non-medical information) (social work report) - Access to worker file, s. 77 (non-medical information) (Board memos) - Access to worker file, s. 77 (confidentiality) (Mental Health Act).

The worker and employer both appealed decisions of the Board granting the employer access to the worker's file but denying access to certain documents. The issues in dispute included SIEF, regarding which the employer submitted that a preexisting psychological condition prolonged recovery.

The documents in issue were psychiatric reports and memos regarding a specific incident. Not every event a worker's life can be considered relevant to SIEF where a preexisting psychological condition is alleged. However, in this case, there was evidence that the worker required psychiatric treatment after the accident. Although there was no evidence of a preexisting psychological condition, it was reasonable to consider the evidence of a post-accident psychological condition as evidence giving rise to the assumption that the worker had a predisposition for the development of a psychological disorder. The documents were relevant to the issue in dispute and should be released to the employer.

The Board also denied access to a social work report and some Board memos. Section 77(3) provides for

access to non-medical information if it is relevant to the issue in dispute. Section 77(5) provides for access to medical information after considering objections of the worker. The Panel found that the social work report was not a medical report. It dealt with the worker's family support and possible counselling following the incident. It was not prepared by a medical practitioner and did not address medical issues. The report was relevant and should be released to the employer under s. 77(3).

Board memos should be reviewed under s. 77(5) if they contain medical reports or opinions. However, memos by claims adjudicators cannot be considered medical reports or opinions. A reference to a medical incident is not the same as a medical report or opinion. In this case, the memos should also be released to the employer.

The worker submitted that the documents should be withheld under provisions of the Mental Health Act. Although the Panel did not have jurisdiction to interpret that Act, it was of the view that the Mental Health Act did not protect information from disclosure once the information had been properly released by a psychiatric facility to the Board.

The employer's appeal was allowed. The worker's appeal was dismissed. [11 pages]

WCAT Decisions Considered: Decision No. 1174/87 (1988), 9 W.C.A.T.R. 192 apId; Decision No. 350/88 (1988), 9 W.C.A.T.R. 298 apId; Decision No. 431/89 (1989), 11 W.C.A.T.R. 355 apId; Decision No. 301/90 (1990), 15 W.C.A.T.R. 179 consd
Other Statutes Considered: Mental Health Act, R.S.O. 1980 c. 262

DECISION NO. 207/90 (04/02/91) Signoroni Klym Jago

Aggravation (preexisting condition) (narcolepsy) - Narcolepsy - Shift work.

The worker claimed benefits for seven two-week periods between May 1988 and January 1989. He had suffered from sleep disorders from his childhood. The worker was aged 36 and had been working on rotating shifts since 1975. For a four-month period in 1987 the worker did only regular daytime work. He began to feel better within a few weeks of working the daytime schedule. This prompted the worker to associate his sleep disorders with his shift work and to renew his efforts to find medical assistance. Narcolepsy was diagnosed in late 1987. When the worker resumed shift work in early 1988, his symptoms became more severe. The worker claimed benefits on the basis of a compensable aggravation of a preexisting non-compensable condition.

The medical literature indicated that narcolepsy was a condition subject to ongoing fluctuations and that shift work could well affect the synchronization of the physiological rhythms that govern the various stages of human consciousness. There was a medical report on file that conditions which disperse sleep, such as shift work, could aggravate the symptoms of narcolepsy. The severity of the worker's pre-existing condition rendered him more susceptible to negative fluctuations.

The specific nature of the shift work was a significant contributing factor to the aggravation of the pre-existing condition. The shift work was not suitable employment during the periods in question. The worker was entitled to benefits during those periods. [10 pages]

DECISION NO. 126R (05/02/91) Carlan McCombie Jago

Reconsideration (error of law) - Reconsideration (procedural error) - Evidence (rejection of direct testimony) - Procedure (inspection).

The worker requested reconsideration of Decision No. 126. The worker submitted that the Panel misunderstood documents, should have inspected the employer's premises, did not give proper weight to the worker's sworn testimony and failed to accept an affidavit of a witness.

Regarding errors of fact, the Panel found no new evidence brought forward by the worker. The worker was arguing that the Panel should have accepted a different interpretation of the facts. This was not reason to reconsider.

Although the Tribunal does have the power to inspect premises, this power is usually exercised only when there is prima facie reason to believe that the evidence cannot be understood without a view of the site. That was not the situation in this case.

Regarding rejection of direct testimony and the affidavit, the Panel considered the case of *Pitts v. Ontario* and found that the court was saying that weighing of evidence must be done in a fair, non-arbitrary way and that reasons for rejection of sworn evidence should be stated clearly. In Decision No. 126, the Panel found a number of inconsistencies, which was sufficient to meet the requirements for reasons for rejection of testimony. In addition, this was not a situation in which the Panel rejected sworn evidence in favour of hearsay, upon which cross-examination could not be conducted. Proceedings at the Tribunal are not adversarial. The worker was confronted with information that he provided to various people who were responsible for his treatment and care. The worker had a full opportunity to address contradictions and provide additional evidence.

The application for reconsideration was denied. [7 pages]

WCAT Decisions Considered: 126 consd, 450 reld to, 998/88 reld to

Cases Considered: *Girvin v. Consumers' Gas Co.* (1973), 40 D.L.R. (3d) 509 (Ont. Div. Ct.) distd; *Pitts v. Ontario (Ministry of Community & Social Services, Director of Family Benefits Branch)* (1985), 51 O.R. (2d) 302 (Ont. Div. Ct.) consd

DECISION NO. 39/91 (05/02/91) Stewart Robillard Preston

Continuing entitlement - Aggravation (preexisting condition) (disc, degeneration).

The worker experienced back pain at work in May 1986. She appealed a decision of the Hearings Officer denying continuing entitlement subsequent to June 1987.

The worker had severe preexisting degenerative disc disease. On the evidence, the worker's continuing problems resulted from the progression of the preexisting condition rather than the aggravation of the condition at work. The appeal was dismissed. [5 pages]

DECISION NO. 14/91 (06/02/91) Stewart Drennan Nipshagen*Subsequent incidents (outside work) - Intervening causes.*

The worker suffered an ankle injury in January 1987 and returned to full time work in February 1987. In January 1989, the worker had to walk 1.4 kilometres when his car broke down. His foot became painful and swollen and he was off work until March 1989. In November 1989, he was awarded a 5% pension retroactive to January 1987. The worker appealed a decision of the Hearings Officer denying entitlement to temporary benefits from January 1989 to March 1989.

Although the worker had returned to work, he continued to have ankle problems. A relatively minor, everyday activity like walking 1.4 kilometres was not a significant enough event to break the chain of causation. In this case, where the compensable injury caused ongoing problems and the activity that precipitated the worsening of the condition was not particularly strenuous or unusual, the causal relationship was established. The appeal was allowed. [6 pages]

DECISION NO. 921/90 (07/02/91) Chapnik Lebert Meslin*Delay (claim) - Accident (occurrence).*

The worker appealed a decision of the Hearings Officer denying entitlement for a back condition which the worker claimed was related to accidents in August 1988.

The worker had a significant symptomatic underlying back condition. She was able to complete her shifts on the days of the alleged accidents. There was a two month delay in claiming benefits. On the evidence, the Panel found that the worker did not suffer an injury by accident. The back condition was likely related to the preexisting condition and a prior non-compensable accident. The appeal was dismissed. [6 pages]

DECISION NO. 938/90I (07/02/91) Moore Higson Nipshagen*Continuing entitlement - Permanent disability.*

The worker suffered a back strain in July 1986 and returned to work at the end of September 1986. He laid off four days later due to continuing back problems. In November 1990, he was awarded a 10% pension retroactive to the date he was examined by his doctor in October 1986. The worker appealed a decision of the Hearings Officer denying continuing temporary benefits subsequent to September 1986.

On the evidence, the accident aggravated an asymptomatic preexisting condition. The result of the aggravation was that a chronic disability set in quite quickly. The worker's condition was permanent by the time he returned to work in September 1986. The worker was entitled to the pension retroactive to September 1986. The appeal was allowed in part. [7 pages]

DECISION NO. 852/88 (08/02/91) Strachan Heard Jewell

Penalties (new owner) - Time limits (penalties) - Discretion, Board (employer assessment) (fettering) - Board Directives and Guidelines (penalty assessments).

The employer appealed a decision of the Hearings Officer confirming a penalty assessment for the years 1982-84. The employer submitted that the assessment should be cancelled on the basis of changes implemented since new ownership took control in 1988, on the basis of a limitation period in s. 6(1) of Reg. 951 and on the basis of fettering of the Board's discretion by s. 6(3) of the regulation.

The Panel found that it was not appropriate to allow the employer to pass on its compensation costs to other employers on the basis of a safety program instituted in 1988.

The employer submitted that the words "two of the last three complete years of operation" in s. 6(1) of Reg. 951 created a limitation period so that the period under review must be the three years immediately prior to the date of the issue of the penalty assessment. The Panel found that the words merely referred to the period under review and did not create a limitation period.

The Panel agreed with Decision No. 845/88 that s. 6(3) of Reg. 951 fetters the Board's discretion under s. 91(7). The Panel found that the regulation should be considered as a guideline to the exercise of the discretion under s. 91(7). In this case, there was no reason to deviate from the 100% penalty in s. 6(3) of the regulation.

The appeal was dismissed. [13 pages]

WCAT Decisions Considered: Decision No. 845/88 (1989), 11 W.C.A.T.R. 154 apd; Decision No. 269/89 reld to

Regulations considered: Reg. 951, s. 6(3)

Board Directives and Guidelines: Additional Assessments Policies and Procedures, Board Minute 6, January 14, 1975, p. 4419

Other Statutes Considered: Public Service Staff Relations Act, R.S.C. 1970, c. I-23

Cases Considered: Can. (A.G.) v. Public Service Staff Relations Board (1977), 74 D.L.R. (3d) 307 apd; Conn Chem Ltd. v. Ontario (WCB) (May 22, 1979) (Ont. S.C.) (unrep.) apd

DECISION NO. 879/88L2 (08/02/91) Onen Robillard Nipshagen

Leave to appeal (good reason to doubt correctness) (consideration of evidence) - Reconsideration.

The worker applied for leave to appeal a decision of the Appeal Board denying entitlement for a left knee condition in 1980 which the worker related to a compensable accident in 1978. This application was a reconsideration of an application for leave in Decision No. 879/88L pursuant to Decision No. 879/88LR.

There was good reason to doubt correctness of the Appeal Board decision. There was controversy whether the 1978 accident injured the worker's left knee or his right knee. The Appeal Board confined its decision to whether there was a disability arising out of an accident in 1980. It did not address the conflict about the 1978 accident, which, if resolved in favour of the worker, might have resulted in entitlement on an aggravation basis.

Leave to appeal was granted. [6 pages]

WCAT Decisions Considered: Decision No. 131 (1986), 2 W.C.A.T.R. 77 reld to; Decisions No. 879/88L reld to, 879/88LR reld to

DECISION NO. 712/89 (08/02/91) Strachan Rao Nipshagen

Pensions (assessment) (finger) (amputation).

The worker appealed a decision of the Hearings Officer denying an increase in the worker's pension. In 1973, the worker suffered a crush injury to his hand, resulting in partial amputation of the middle finger. In 1975, he was awarded a 1.8% pension.

The Panel found that the worker's condition had deteriorated since the pension was awarded, particularly after surgery to alleviate neuroma problems in 1984. The worker's entire hand was now weakened and he had persistent pain. The appeal was allowed. The matter was referred back to the Board for a reassessment of the worker's whole hand. [7 pages]

WCAT Decisions Considered: Decision No. 915 (1987), 7 W.C.A.T.R. 1 *reld* to

DECISION NO. 463/90 (08/02/91) Carlan B. Cook Seguin

Disablement (nature of work) - Sewing machine operator.

The worker appealed a decision of the Appeals Adjudicator denying entitlement for a neck disability. The worker had been a buttonhole maker since 1960. The worker developed the neck problem shortly after she began using new equipment in 1980.

The new equipment was very similar to the old equipment but there were slight differences regarding the bobbin and threading process. The worker's job was repetitive and could have given rise to the neck disability even without the new equipment. The Panel found that the repetitive nature of the work together with the minor changes from the new equipment was sufficient to result in the disability. The appeal was allowed. [6 pages]

DECISION NO. 16/91 (08/02/91) Moore Beattie Preston

Rehabilitation, vocational (cooperation) - Travel expenses (treatment).

The worker appealed a decision of the Hearings Officer granting only 50% benefits from March 1989 to April 1990. The Board reduced the benefits for failure to cooperate with rehabilitation after the worker stopped attending a health clinic for treatment.

The worker had to travel two hours each way by public transportation to attend the clinic. He asked the Board to pay for a taxi and stopped attending while waiting for a reply. The Board closed the worker's file and reduced benefits.

The Panel found that the worker was temporarily totally disabled during this period and that, therefore, his benefits should not have been reduced. Even if the worker was partially disabled, he did not fail to

cooperate. He stopped attending the clinic because he was having difficulty travelling. In addition, the Panel found that the worker met the requirements of the Board policy for payment of travel expenses.

The appeal was allowed. [7 pages]

Board Directives and Guidelines: Operational Policy Manual, Document no. 06-01-03

DECISION NO. 41/91 (08/02/91) Onen Higson Nipshagen

Exposure (bleach fumes) - Benefit of the doubt.

The worker appealed a decision the Hearings Officer denying entitlement for exposure to fumes. The worker worked in a clothing store. On April 28, 1987, she was unpacking a shipment of bleached jeans. She experienced an immediate onset of symptoms, including shortness of breath and tightness in her chest. On advice of her doctor, she returned to work the following two days but left work because she could still smell the odour.

The worker had experienced a reaction to bleach at home earlier in April. She contacted her doctor by phone after the work incident but did not see him. However, the store manager did confirm an odour from the jeans when they first arrived in the store on April 24. On the benefit of doubt, the Panel found that the worker aggravated her preexisting condition and was entitled to benefits until April 30, 1987. The Panel found that the fumes dissipated and that the worker was not disabled from working beyond that date.

The appeal was allowed in part. [8 pages]

DECISION NO. 42/91I (08/02/91) Onen Higson Nipshagen

Adjournment (additional evidence).

The worker was appealing a decision of the Appeals Adjudicator denying benefits in 1979 and 1980 for a back condition which the worker related to an accident in 1976.

It appeared that the worker suffered a number of other accidents both before and after the 1976 accident and that it was possible that the worker's condition could be related to these other accidents. However, information regarding these other accidents was not in the Case Description. The hearing was adjourned. Tribunal counsel was instructed to prepare a new Case Description. [5 pages]

DECISION NO. 55/91 (08/02/91) Onen Ferrari Apsey

Overpayment (ability to repay).

The worker appealed a decision of the Hearings Officer refusing to forgive an overpayment. The worker received an overpayment of \$750 due to an administrative error by the Board.

Board policy does allow for suspension or writing off of overpayment. In this case, the worker was 62 years old and lived alone. She was in a deficit situation and relied on loans from her children. The Panel

concluded that recovery of the overpayment should be suspended. It could be reactivated in the future if the worker receives a lump sum benefit payment for arrears of other benefits. The appeal was allowed in part. [5 pages]

Board Directives and Guidelines: Claims Adjudication Branch Procedures Manual, Document no. 33-18-04;
Claims Services Division Manual, s. 40(1), p. 89, Directive 10, s. 40(1), p. 90, Directive 12

DECISION NO. 250/89 (12/02/91) Strachan Heard Nipshagen

Subsequent incidents (outside work) - Credibility (layoff).

The worker suffered back injuries in 1980 and 1981. In 1984, he suffered an acute attack of back pain while lifting a small television set at home. The employer appealed a decision of the Hearings Officer granting entitlement for the incident in 1984.

There was some continuity of complaint, although there was a lack of continuity of treatment. The claim was filed after the worker was dismissed by the employer. However, when balanced against supportive medical evidence of a herniated disc and the continuity of complaint, the Panel found that a causal relationship existed between the compensable accidents and the incident at home in 1984. The appeal was dismissed. [8 pages]

DECISION NO. 336/90 (12/02/91) McIntosh-Janis B. Cook Barbeau

Disablement (repetitive work) - Cashier - Carpal tunnel syndrome.

The worker was a cashier and stock clerk. The worker appealed a decision of the Appeals Adjudicator denying entitlement for a low back condition and carpal tunnel syndrome.

The worker was not entitled to benefits for carpal tunnel syndrome. The worker's condition was bilateral. Her job required working the cash register with one hand and moving the items with the other. The Panel accepted medical evidence that the bilateral nature of the worker's condition was not consistent with a relationship to the worker's work as a cashier.

The Panel found that the worker's preexisting back condition was aggravated by the repetitive nature of the work and by heavy lifting.

The appeal was allowed in part. [7 pages]

Board Directives and Guidelines: Claims Adjudication Branch Procedures Manual, Document no. 33-01-02

DECISION NO. 4/91 (12/02/91) Starkman B. Cook Jago

Commutation (business investment) - Commutation (vehicle purchase) - Pensions (lump sum) (amalgamation of claims).

The worker requested the commutation of his 8% foot pension to buy a dump truck with which he could work as an owner/operator with his aunt's company. His 4% right index finger pension and 2% left thumb pension had already been commuted. In his current job as a machinist, the worker had sustained several injuries to various parts of his body. He attributed these to lapses in concentration caused by the pain in his foot.

The worker earned \$45,000 as a machinist. The worker calculated that with the commutation, his net pay would remain about the same. Without the commutation, he would have to finance \$60,000 of the truck purchase and he would be \$90,000 behind after four years. The worker stated the career change would be too risky if he had to finance the whole purchase.

Section 26(1) applied rather than s. 45(4) of the pre-1989 Act. It is appropriate to total the pensions to determine whether they are greater than 10% so that the whole person concept can be considered.

The Panel directed the worker's pension to be commuted. He was facing ongoing problems in his present job and the career change would lessen the effects of the disability. The Panel was impressed with the worker's research and believed that, with the commutation, the new business was viable. [5 pages]

DECISION NO. 26/91 (12/02/91) Robeson B. Cook Preston

Suitable employment.

The worker injured his back in a fall. He received benefits from March 1986 to January 1987 and from March 1987 to July 15, 1987. He was awarded a 15% pension in May 1988, with full arrears. The evidence was that the worker could return to modified work with restrictions on bending and lifting.

When the worker returned to work in July 1987 he was assigned work assisting the spot welder to assemble large and heavy display cabinets. The spot welding assistant job, as described to the Board counsellor and medical advisor and which they thought to be suitable, was not the job made available to the worker. The cabinet assembly job was a rush job so there was not always time to wait for the forklift. As a result, frequent bending and heavy lifting were involved. There was no opportunity for the worker to take breaks aside from the regularly scheduled ones. The worker laid off work on July 27 and his job was terminated on July 30. It was reinstated in September 1987 following a grievance.

The worker was entitled to full benefits from July 27 to August 17, 1987 as he was totally disabled. He was entitled to full benefits from August 18 to September 21, 1987 as he was partially disabled and suitable modified employment was not provided by the employer. [7 pages]

DECISION NO. 261/89 (13/02/91) Bigras McCombie Apsey

Continuing entitlement - Pensions (assessment) (back).

The worker suffered a low back injury in January 1974 and received benefits until June 1974. He also

received benefits for several days in May 1975. In June 1975, he was assessed for a pension but no pension was awarded since the assessment indicated that the worker's residual disability was not sufficient to warrant an award. The worker appealed a decision of the Appeals Adjudicator denying continuing entitlement.

The Panel found that the worker continued to suffer from low back pain related to the compensable accident and that a non-compensable accident in 1978 was not an intervening cause.

The Panel could not agree with the pension assessment in 1975. There was other medical evidence that the worker could not return to heavy work because of the danger of aggravating his condition. The Panel rated the worker's pension by measuring the impairment of living activities due to the back disability. In June 1975, the only impairment was the inability to perform repetitive bending and heavy lifting. Comparing this to the Rating Schedule, the Panel awarded a 10% pension retroactive to May 1975. The Panel referred the matter back to the Board to consider whether there had been a deterioration since that time. The Panel also referred the issue of chronic pain back to the Board since the Tribunal did not have sufficient information to decide the issue. [15 pages]

WCAT Decisions Considered: Decision No. 915 (1987), 7 W.C.A.T.R. 1 consd

DECISION NO. 655/90 (13/02/91) Bigras McCombie Jago

Accident (occurrence).

The employer appealed a decision of the Hearings Officer granting the worker benefits for a low back disability in August 1986. The employer submitted that the worker's condition was related to a non-compensable condition for which the worker was away from work from August 1985 to January 1986.

On the evidence, the non-compensable condition did not involve the worker's lower back. The back injury resulted from awkward movement in August 1986 while performing a job to which she was not accustomed. The appeal was dismissed. [7 pages]

DECISION NO. 73/91 (13/02/91) Onen M. Cook Preston

Pensions (assessment) (leg).

The worker suffered a crush injury to his lower right leg in 1979. He underwent five surgical procedures and experienced numerous infections. In 1984, the worker was also awarded benefits for a low back disability which resulted from the leg disability. In 1985, the worker was awarded a 10% pension for the back disability and a 20% pension for the leg disability. In 1988, it was increased to 15% for the back and 25% for the leg. The worker appealed a decision of the Hearings Officer regarding the level of pension.

The worker has used a wheelchair extensively since the accident. He is also able to use crutches and, for very short distances at home, a cane. The worker's daily activities were limited. The Panel found that the worker was essentially unable to use his right leg at all. The Panel assessed his pension on the basis of the Rating Schedule for amputation below the knee where the site of the amputation is not suitable for a prosthesis. The Panel chose this, rather than the Schedule for amputation suitable for prosthesis, since a worker with a prosthesis would have some ability to bear weight and walk. Applying the Rating Schedule, the

Panel awarded a 45% pension for the leg disability, retroactive to 1985. The Panel confirmed the 15% award for the low back. [10 pages]

WCAT Decisions Considered: Decision No. 915 (1987), 7 W.C.A.T.R. 1 reld to

DECISION NO. 364/89 (14/02/91) Marafioti Lebert Jago

Continuing entitlement - Delay (onset of symptoms).

The worker slipped and fell in July 1985, injuring her wrist and knee. She received benefits until September 1985. The worker appealed a decision of the Hearings Officer denying continuing entitlement.

The compensable accident was minor. Medical evidence did not support a relationship between further wrist and knee problems and the compensable accident. The appeal was dismissed. [7 pages]

DECISION NO. 326/90I (14/02/91) Moore Lebert Jago

Hearing loss - Board Directives and Guidelines (hearing loss) - Retroactivity.

A steelworker appealed a decision of the Hearings Officer denying entitlement for hearing loss. The worker worked in a noisy environment from 1953 to 1964 and from 1969 to his retirement in 1985.

The Hearings Officer relied on the results of audiograms done by one audiologist to find that the worker had insufficient hearing loss to grant benefits. The Hearings Officer failed to consider the overall pattern of hearing loss apparent when all the audiograms were taken in their totality. Looking at the pattern established from all the audiograms, the Panel found that the worker's hearing deteriorated gradually from 1978 to 1985 when he was exposed to hazardous noise.

The worker met the requirements of the old Board policy on hearing loss for health care benefits from 1980. He was entitled to a pension under the old policy from September 1986. New Board policy, effective June 1988, lowered the threshold for pensions. According to the thresholds of the new policy, the worker would have been entitled to a pension in February 1984. A different panel of the Tribunal was considering the issue of retroactivity of the new policy. Before dealing with retroactivity in this case, the Panel would wait until the other panel released its decision. [12 pages]

WCAT Decisions Considered: 109/89I reld to, 434/89I reld to

Board Directives and Guidelines: Claims Services Division Manual, s. 122, p. 270, Directive 19; Operational Policy Manual, Document no. 04-03-06

Cases Considered: Review of Decision No. 915 and 915A (1990), 15 W.C.A.T.R. 247 (WCB Bd. of Directors) reld to

DECISION NO. 880/88R (19/02/91) Starkman Lebert Barbeau*Reconsideration.*

In Decision No. 880/88, the Panel instructed the Board to examine the worker for a pension for the residual effects of glaucoma. It appeared that the Board reviewed the worker's file and found that there was no residual disability from glaucoma. The worker requested that the Panel intervene.

The Panel noted that it directed an examination, not merely a review of the file. However, the Panel declined to intervene. The worker has a right to appeal any decision of the Board. [3 pages]

WCAT Decisions Considered: Decision No. 880/88 (1990), 14 W.C.A.T.R. 26 *reld to*

DECISION NO. 276/89 (19/02/91) Strachan Drennan Ronson*Temporary partial disability - Chronic pain.*

The worker suffered a shoulder injury in 1981. Benefits were terminated on July 13, 1984, after a 0% pension assessment. The worker returned to work on August 14 but stopped working again on August 21. The worker appealed a decision of the Hearings Officer denying benefits from July 13 to August 14, 1984, and from August 21, 1984, to July 3, 1987, when he was awarded a 10% pension for chronic pain.

On the evidence, there was no continuing organic disability but there was evidence of chronic pain. There were a number of non-compensable personal factors which contributed to the chronic pain but the compensable accident was also a significant contributing factor.

The worker was entitled to full temporary partial disability benefits from July 13 to August 14, 1984. He was willing to return to work during this period but was unable to do so while waiting for a medical certificate and proof of enrolment in a self-help programme for alcoholics, required by the employer.

Applying the benefit of doubt, the worker was entitled to benefits from August 21, 1984, for aggravation of his condition, until October 23, 1984, when the aggravation resolved. He was not entitled to temporary benefits subsequent to October 23, 1984. The appeal was allowed in part. [12 pages]

DECISION NO. 532/89 (19/02/91) Kenny B. Cook Seguin*Pensions (assessment) (wrist) - Pensions (assessment) (dynamic testing).*

The worker suffered a right forearm and wrist injury in 1985 when a gate from a press fell on it. In 1987, he was awarded a 5% pension. The worker appealed a decision of the Hearings Officer confirming the 5% pension.

The worker sustained a large laceration and later developed a neuroma, requiring surgery. The worker had residual tingling and loss of sensation and his hand was very sensitive to temperature changes. The pension assessment correctly rated the sensory problems that the pension examiner considered. However, the examiner did not consider the worker's inability to maintain a grip, even after a request by the Panel to

reassess the worker on this basis. The assessments found that the worker had a strong grip but this was based on static testing and did not include dynamic testing to consider the ability to sustain the grip.

The Panel assessed the pension considering the Rating Schedule for other wrist injuries and prior Tribunal decisions for similar conditions and found that the worker was entitled to an increase in his pension from 5% to 10%. The appeal was allowed. [21 pages]

WCAT Decisions Considered: Decision No. 915 (1987), 7 W.C.A.T.R. 1 consd; Decision No. 135/90 (1990), 14 W.C.A.T.R. 266 consd; Decision No. 654/88 consd

DECISION NO. 552/89 (19/02/91) Bigras Rao Jago

Temporary total disability - Pensions (assessment) (ankle).

The worker sustained a severe ankle sprain in May 1982. In March 1984 he was awarded a 5% pension. He subsequently sustained a neck and back injury for which he was awarded a 20% pension. In 1985, at age 50, the worker took a "disability retirement". In January 1986 he began a 10 to 12 hour per week light janitorial job, but he abandoned it in April 1986.

The worker claimed that the ankle injury was part of the reason for his early retirement in 1985. He stated that the janitorial job caused pain in his ankle such that he was compelled to leave the job. The worker claimed that he was totally disabled from June 1986 to January 1987 and he thus sought full benefits for that period. He also sought an increase in his pension rating, based on deterioration due to post-traumatic arthritis.

The Panel found that the worker's ankle symptoms did not result in his total disability after June 1986. From October 1983 to June 1986, the worker received no medical treatment for his ankle, though he was being treated for his neck and back injury. Though the worker suffered ankle pain during the period in question, the dominant medical problem continued to be the neck and back injury. The ankle injury thus did not render the worker totally disabled. No particular treatment was directed to the ankle. A January 1987 x-ray revealed a normal ankle. The worker's complaints subsequent to the taking of the x-ray were no different than during the period when total disability was claimed.

The Panel denied a pension increase as the worker's level of disability had not increased between his examinations by the Board in 1984 and 1988. The 1987 x-ray was normal. The worker was able to continue work from 1983 to 1985 when his ankle condition was as severe as it was when he was examined in 1988. [9 pages]

WCAT Decisions Considered: Decision No. 915 (1987), 7 W.C.A.T.R. 1 reld to

DECISION NO. 944/90 (19/02/91) Kenny Klym Preston*Delay (claim).*

The worker appealed a decision of the Hearings Officer denying entitlement for a low back injury suffered in 1972. The worker explained the delay on the basis that he just recently learned that he could claim for old unwitnessed accidents.

The worker produced a witness at the hearing for the first time. The worker had not given proper notice of this witness. None the less, the Panel found the witness to be credible. Medical reports at the time also supported the worker's claim. The reports, made by the worker's treating doctors, described the accident and a subsequent period of disability, even though the worker had not claimed workers' compensation benefits at the time. The appeal was allowed. [9 pages]

WCAT Decisions Considered: Decision No. 9 (1986), 1 W.C.A.T.R. 23 *reld to*

DECISION NO. 81/91I (19/02/91) Kenny B. Cook Apsey*Commutation (debt liquidation) - Credibility (new witness).*

The worker suffered a knee injury, for which he was awarded a 20% pension. In 1986, he received a partial commutation in the amount of \$27,000 to pay off debts and in 1990 another partial commutation in the amount of \$18,000 to buy a car. The worker appealed a decision of the Hearings Officer denying commutation of the remainder of his pension to pay off more debts.

There was evidence, including evidence from a psychiatrist that the worker's financial situation was a source of considerable stress.

Since 1986, when his debts were paid off by the partial commutation, the worker had increased his mortgage by \$20,000 and acquired debts of \$30,000. The combined family income of the worker and his wife was about \$40,000 yearly after tax. The worker could not explain how he acquired this debt but he did not believe that there was a spending problem.

The Panel found it likely that a commutation would be only a short term solution and that he would again fall into the same type of financial situation. However, the Panel was impressed with the worker's commitment to retrain. The Panel also noted that the worker's wife, who manages the household finances, did not attend the hearing.

The Panel allowed the worker 60 days to provide further information regarding how he acquired his debts, whether there has been any reduction in spending and whether he has a realistic budget for the future, failing which the appeal is dismissed. [9 pages]

WCAT Decisions Considered: Decision No. 16 (1986), 1 W.C.A.T.R. 62 *reld to*; Decision No. 235/88 (1988), 8 W.C.A.T.R. 347 *reld to*; Decision No. 608/89 (1989), 12 W.C.A.T.R. 216 *reld to*; Decisions No. 979/87 *reld to*, 100/88 *reld to*, 128/88 *reld to*, 290/88 *reld to*, 892/88 *reld to*, 471/89 *reld to*, 750/89 *reld to*, 839/89 *reld to*

Board Directives and Guidelines: Commutation of Pensions Policy, Board Minute 4, April 3, 1987, p. 5186

DECISION NO. 755/88R (20/02/91) Starkman McCombie Preston

Reconsideration - Reconsideration (advisability) - Reconsideration (change in law) .

The worker sought a reconsideration of Decision No. 755/88. That decision denied the worker's appeal in which he argued that the Board's calculation of his earnings basis to be used in paying his pension contravened the Charter of Rights (Can.). The worker had argued that the guarantee of equality under s. 15 of the Charter had been violated because s. 134 of the pre-1989 Act allowed for earnings to be calculated on more recent employment in the case of temporary disability, while for permanent disability cases, only earnings at the time of the original accident could be considered.

The worker argued that the usual test in reconsideration cases (a significant defect which, if corrected, would probably change the result of the original decision) should not apply in this instance because the law on which the original decision was based had been completely reformulated by two subsequent court decisions.

Even if the Panel were to accept that a different test would apply in such circumstances, it could not accept that there had been any drastic change in the law which would be of benefit to the worker. In fact, *Andrews v. Law Society of British Columbia (S.C.C.)* was generally seen as taking a narrower approach to s. 15 Charter rights than did Decision No. 755/88. In any event, the Panel could not accept that it was advisable to reconsider a decision every time the law changes, regardless of whether there is a probability that the outcome of the case would be different. As the court decisions were not "overrulings" the question of their retroactive application was moot.

The reconsideration request was denied. [5 pages]

WCAT Decisions Considered: Decision No. 95R (1989), 11 W.C.A.T.R. 1 consd; Decision No. 915A (1988), 7 W.C.A.T.R. 269 reld to; Decision No. 755/88 (1988), 10 W.C.A.T.R. 323 consd; Decision Nos. 72R reld to, 72R2 reld to

Cases Considered: *Andrews v. Law Society of (B.C.)*, 36 C.R.R. 193 (S.C.C.) consd; *R. v. Turpin*, 39 C.R.R. (S.C.C.) 306 consd

Other Statutes Considered: Canadian Charter of Rights and Freedoms, s.15

DECISION NO. 913/89L (20/02/91) Strachan Robillard Aspey

Leave to appeal (good reason to doubt correctness) (consideration of issue).

The worker applied for leave to appeal a decision of the Appeal Board denying entitlement to a supplement. The Appeal Board found that there was no new evidence to cause it to overturn the decision of the Appeals Adjudicator. This created the impression that there was a presumption in favour of the decision of the Appeals Adjudicator and that there was an onus on the worker to introduce new evidence to the Appeal Board. This gave the Panel good reason to doubt correctness of the Appeal Board decision.

Leave to appeal was granted. [5 pages]

DECISION NO. 968/90 (20/02/91) Bradbury Robillard Chapman

Re-employment (reinstatement) - Re-employment (continuous employment) - Re-employment (determination re return to work) - Re-employment (notice from Board) (form of notice) - Re-employment (essential duties) - Board Directives and Guidelines (reinstatement) (essential duties) (job outcome) - Accommodation (undue hardship) (cost) - Accommodation (undue hardship) (health and safety risks) - Re-employment (non-compliance) - Discretion, Board (re-employment) (consequences of non-compliance).

The employer appealed a decision of the Reinstatement Officer finding that the employer had not fulfilled its obligations to reinstate the worker and assessing a penalty.

The worker was a refinery production worker. He suffered a low back injury in February 1990. On March 19, the worker's doctor reported that the worker should be able to return to work on March 26. The worker returned to work on March 26 but the employer found the doctor's note of March 19 insufficient since the note stated that the worker "should" be able to return. Also on March 26, a Claims Adjudicator sent a notice to the employer that the employer was obligated to reinstate the worker. On March 27, the worker obtained a certificate for return to work from his doctor. On the doctor's recommendation, the certificate contained a requirement that the worker be allowed to sit for 10 minutes every hour as needed to relieve back pain. On March 28, the Claims Adjudicator advised the employer by telephone that it was required to reinstate. The employer refused, citing the vagueness of the restrictions.

The Board then attempted mediation, which failed. On June 1, the Claims Adjudicator notified the employer of the worker's fitness to return to work and perform the essential duties of his pre-injury job. On July 13, the worker obtained a letter from a Board doctor and from his own doctor that he could return to work without the accommodation of a chair. On July 19, the worker did return to work.

The worker was continuously employed by the employer for one year before the accident as required by s. 54b(1). He was hired in 1979. His employment was terminated briefly in August 1989 because of a safety violation. He was reinstated on November 1, 1989, with full seniority, after an agreement between the company and the union. The Panel agreed with the Reinstatement Officer that the parties intended to treat the employment relationship as a continuing one.

Section 54b(2) and (3) requires the Board to make a determination regarding the worker's ability to return to work and to inform the employer. In this case, the Board made three such determinations (March 26, March 28 and June 1), two in writing and one by telephone. The Board has to make determinations quickly about return to work. However, a worker's needs and abilities may change or turn out not to be fully known, in which case the Board would have to make a new determination. The Board should make a new determination and give notice to the employer each time the situation changes or as the need arises. The Panel was satisfied that the determinations in this case were based on appropriate evidence and met the requirements of the Act. In addition, the Panel found written notice was not required by s. 54b(3).

The Board was required to determine whether the worker was able to perform the essential duties of his pre-injury employment. Board policy provides that essential duties should be determined considering the duties necessary to produce the actual job outcome. In this case, the Board obtained a worksite analysis from a Board analyst. The Panel agreed with the essential duties found in the analysis. The essential duties of the refinery production worker's job were loading and off-loading rail cars and truck tankers.

The question of determining whether the worker was able to perform the essential duties of the job must be decided after accommodation of the work or workplace is determined under s. 54b(6). In this case, the worker's condition had resolved but he continued to experience occasional back pain. The Panel accepted the

opinion of the Board analyst, over that of an analyst retained by the employer, that the worker could perform his job with the accommodation of a chair. The Board's analyst understood the requirements of the Act and considered the accommodation in light of the worker's essential duties. In addition, there was evidence from other workers that they regularly sat on overturned buckets during their shifts and could still perform their jobs.

Pursuant to s. 54b(6), an employer is not required to accommodate the work or workplace if it would cause undue hardship to the employer. Human Rights Code guidelines, which were adopted by the Board, provided that the factors to be considered were cost, outside sources of funding and health & safety requirements. In this case, only cost and health & safety requirements were raised. Indirect costs of accommodation can be considered in assessing undue hardship. However, there was no evidence that a chair would lead to a lessening of the company's productivity. The Panel found that the cost of the chair was not an undue hardship. The Panel also found no health & safety risks, considering the evidence that workers were able to perform the job while sitting on overturned buckets and that there was no evidence of any spills while filling trucks and rail cars while workers were sitting. The Panel concluded that there was no evidence that accommodation would result in undue hardship.

It was important to reinforce the seriousness of the rights under s. 54b. It was an appropriate general guideline for exercise of the Board's discretion regarding non-compliance to levy penalties in all but the most exceptional circumstances. The criteria considered by the Reinstatement Officer in determining the penalty were: 1) need to underline the seriousness of the obligation; 2) nature of the breach; 3) willingness to rectify the breach; 4) whether this was the first breach by the employer; 5) any other circumstances. In this case, the Panel agreed with the penalty imposed, which was 40% of the worker's net average earnings for the year preceding the injury and the equivalent of benefits under s. 40 from July 13 to July 19.

The appeal was dismissed. [31 pages]

Board Directives and Guidelines: Operational Policy Manual, Documents no. 07-05-05, 07-05-07, 07-05-08
Other Statutes Considered: Human Rights Code, 1981, S.O. 1981 c. 53, ss. 16(1), 16(1a)

DECISION NO. 17/91 (20/02/91) Faubert Drennan Apsey

Temporary disability (beyond pension level).

The worker appealed a decision of the Hearings Officer denying temporary total disability benefits from January 1988 to March 1988. On the evidence, the worker was not disabled beyond his pension level during the period in question. The appeal was dismissed. [5 pages]

WCAT Decisions Considered: 330/88 reld to

DECISION NO. 54/91 (20/02/91) McIntosh-Janis Klym Ronson

Temporary disability (beyond pension level) - Supplements, older worker (age).

The worker suffered a compensable back injury in 1966. He was awarded a pension of 15% in 1968, raised to 25% in 1987. He was also awarded a 10% pension for psychotraumatic disability in 1988, increased to 25% in 1989. The worker appealed a decision of the Hearings Officer denying temporary benefits subsequent to April 1988 and granting an older worker supplement from February 1989 only when the worker turned 49.

On the evidence, the worker was not disabled beyond his pension level subsequent to April 1988. The Panel agreed with previous decisions that chronological age is not the determining factor for an older worker a supplement. The Panel found that the worker's age was a significant factor in the worker's unemployability and in the lack of appropriate rehabilitation programmes. The worker was entitled to the older worker supplement from April 1988, when temporary benefits ceased. The appeal was allowed in part. [8 pages]

WCAT Decisions Considered: Decision No. 320/88 (1988), 9 W.C.A.T.R. 292 apld; Decision No. 378/89 (1989), 1 W.C.A.T.R. 345 apld; Decision No. 729/89 (1989), 12 W.C.A.T.R. 251 apld

DECISION NO. 68/91I (20/02/91) McIntosh-Janis Robillard Chapman

Penalties - Board Directives and Guidelines (penalty assessments) (distortions) - Procedure (disclosure of evidence) - Natural justice (disclosure of evidence) - Board Directives and Guidelines (reconsideration).

The employer was appealing a decision of the Hearings Officer confirming a penalty assessment for the years 1983-85. In this decision the Panel dealt with two preliminary matters.

After the decision of the Hearings Officer and after filing the appeal to the Tribunal, the employer commenced a detailed financial analysis of the relevant years. This led the employer to believe that one particular claim, if deleted, would eliminate the deficit for 1984 if costs that were transferred to SIEF were also deleted in accordance with Board policy. The Board refused to reconsider, stating that it had no jurisdiction since the appeal was before the Tribunal. The Panel decided that it would deal with the employer's request that the Tribunal direct the Board to reconsider, after the information noted below is obtained.

After filing the appeal to the Tribunal, the employer requested that Tribunal counsel obtain information from the Board to explain its decision. The employer requested the details of all compensation claims relating to the company's rate group for the years in question. The Board provided the information for the years 1985 and onward but not for the years 1983 and 1984 due to lack of computerized records.

It is a fundamental principle of administrative law that a party is entitled to know the case against him and must be given a fair opportunity of answering that case. The information requested by the employer must have formed the factual basis for the Board's finding that no single claim, if deleted, would eliminate the deficits for 1983 and 1984. The Panel requested the information from the Board for the years 1983 and 1984 as well as some other additional information. After this information is forwarded by the Board, the employer should advise how it wishes to proceed. [6 pages]

Board Directives and Guidelines: Employer Assessment Policies Manual, Documents no. 04-04-04, 04-04-07;
Operational Policy Manual, Documents no. 08-06-05, 09-01-07

DECISION NO. 95/91 (20/02/91) Signoroni B. Cook Apsey

Access to worker file, s. 77.

Access to the worker's file was granted to the employer, except for several Board memos and portions of one medical report which were not relevant to the issue in dispute. [3 pages]

DECISION NO. 370/89R (21/02/91) Chapnik B. Cook Apsey

Reconsideration.

The worker's request to reconsider Decision No. 370/89 was denied. The Panel had considered and weighed all the evidence in arriving at its conclusion. [5 pages]

WCAT Decisions Considered: 72R apld, 370/89 consd
Practice Directions considered: Practice Direction No. 8 (1987), 1 W.C.A.T.R. 233

DECISION NO. 836/89 (21/02/91) Carlan Lebert Sutherland

Access to worker file, s. 77 (issue in dispute) (interest of employer) - Parties (interest of employer).

The worker appealed a decision of the Board to release documents to the employer. The worker was injured in 1980. In 1983, he was awarded a 65% pension. In 1989, the employer decided to contest the quantum of the award.

The Panel considered whether the employer could put an issue in dispute if it could not benefit even if the issue were resolved in its favour. It was submitted that, if the employer had not received a penalty for the relevant years, a reduction of costs in 1989 could have no effect on the company's costs. However, the Board indicated that a reduction of costs would affect the company's lifetime accident cost record. The worker responded that it was highly unlikely that this company would ever be in a penalty situation since its costs were far below the costs of the only other company in the rate group.

The Panel found that it was not possible to determine the effects of a decision prior to making the decision, particularly given the long term funding and accounting system of the Board. Further, employers should be encouraged to participate in the system which they fund. The Panel concluded that financial implications were not an appropriate consideration in determining whether there was an issue in dispute.

The appeal was dismissed. Access to the worker's file was granted to the employer. [5 pages]

DECISION NO. 840/89 (22/02/91) Strachan Higson Preston

Consequences of injury (residual weakness) - Pensions (assessment) (enhancement factor).

The worker suffered a right shoulder injury in 1966. In 1984, he was awarded a 5% pension retroactive to 1977. Later, this was increased to 8%. The worker appealed denial of entitlement for a left shoulder disability, denial of pension arrears to 1969 and denial of an increase in the pension.

The worker submitted that the left shoulder disability was a consequence of increased use due to the right shoulder condition. The Panel found that the left shoulder condition was not related to the compensable right shoulder condition, considering that the worker returned to heavy work from 1969 to 1977 with no medical treatment and that the onset of left shoulder problems in the 1980s followed a prolonged period of unemployment.

The worker was not entitled to pension arrears to 1969. He could perform heavy work until 1977, when his condition began deteriorating.

If both shoulder conditions were compensable, the worker would have been entitled to a multiple factor. Although the left shoulder condition was not compensable, it would create the same synergistic effect as a compensable disability vis a vis the right shoulder condition. Therefore, it was appropriate that all or part of the multiple factor be reflected in the worker's pension. The matter was referred back to the Board for a further assessment of the right shoulder disability. The appeal was allowed in part. [8 pages]

DECISION NO. 962/89 (22/02/91) McIntosh-Janis McCombie Ronson

Psychotraumatic disability - Consequences of injury (iatrogenic illness) (medication) (Percodan) - Drug abuse - Significant contribution (of compensable accident to psychological condition) - Preexisting condition (depression).

The worker's left index finger was amputated as a result of a work accident in October 1974. The worker became addicted to Percodan prescribed to relieve pain associated with the amputation. He was convicted and jailed on several occasions for offences arising from attempts to obtain larger supplies of the drug. The worker's fiancée broke off their engagement because of the amputation. The worker had family problems resulting from a divorce and custody dispute in 1982 and 1983. He also was under pressure to support his own family and his extended family outside of Canada.

The Panel found that the worker was entitled to benefits for a psychological disability and drug addiction related to the compensable accident.

The employer's submission that the worker's drug addiction was not a foreseeable consequence of the compensable accident was rejected. The Tribunal had never adopted a "reasonably foreseeable" test. It has consistently held that a disability results from an injury if the injury made a significant contribution to the development of the disability.

The worker's drug addiction was not an intervening cause. Rather, it was a sequela of the compensable accident. It was a symptom of the psychological condition which developed as a reaction to the accident. The accident was a significant contributing factor to the worker becoming depressed, requiring drug treatment and becoming addicted to the prescribed pain-killers. The worker's family problems did not play a significant role in the continuation of the worker's problems.

Traumatic neurotic reaction was diagnosed within three months of the accident. Subsequent medical reports confirmed the diagnosis of depression and the contribution of the accident to the depression. Even if 1973 medical reports were interpreted as evidence of a pre-existing psychological condition or of a predisposition to drug addiction, these factors had not stopped the worker from working. They did not reduce the role of the compensable accident to insignificance. [9 pages]

WCAT Decisions Considered: Decision No. 962/89L reld to

DECISION NO. 46/90 (22/02/91) Starkman Fox Nipshagen

Medical examination (section 21).

The worker was not required to attend a medical examination by a doctor selected by the employer since the employer had not applied for access to the worker's file. [4 pages]

WCAT Decisions Considered: Decision No. 185 (1986), 3 W.C.A.T.R. 110 apld; Decision No. 1004/89 apld

DECISION NO. 608/90 (22/02/91) Hartman B. Cook Meslin

Temporary disability (beyond pension level).

The worker sustained a right shoulder injury in June 1986. Tendonitis was diagnosed and he received total temporary benefits from June 1986 to October 1987. At that time the worker was awarded a 10% pension for chronic tendonitis. He also received a 90% supplement from October 1987 to February 1988. In September 1988 the worker again began receiving temporary total benefits.

The worker was not entitled to total temporary benefits from February 1988 to September 1988. The only evidence supporting total disability was that of the worker and the Panel was not impressed with his credibility. [7 pages]

DECISION NO. 28/91 (22/02/91) Moore Meslin Higson

Chronic pain - Pensions (assessment) (leg).

The worker suffered a middle back injury in 1976 for which he was awarded a 10% pension. He suffered a lower back injury in 1978 for which he was awarded an additional 10% pension. He also suffered a further back injury in 1982. The worker appealed a decision of the Hearings Officer denying an increase in the 20% total pension.

The pension assessments mentioned some loss of sensation in the left leg. The Board was of the view that the worker's condition was strictly organic and adequately compensated by the 20% award.

The Panel found that there was evidence of a non-organic condition. However, the worker's condition was

essentially organic in nature and, therefore, the non-organic aspect should be compensated with reference to the organic disability policy.

The worker had mid-back, low back and leg pain. The Board recognized the back pain in the pension award. However, it had not recognized the leg pain. The Panel assessed the pension for the leg pain by comparison with the Rating Schedule of 30% for a fully immobilized hip. The functional loss experienced by the worker was equivalent to one-third of the fully immobilized hip. The Panel awarded an additional 10% pension, retroactive to March 27, 1986, the retroactive date for chronic pain. The appeal was allowed. [8 pages]

Board Directives and Guidelines: Chronic Pain Disorder Policy, Board Minute 2, July 3, 1987, p. 5196

DECISION NO. 58/91 (22/02/91) Stewart Drennan Apsey

Withdrawal (of appeal).

The worker's appeal was withdrawn to allow the worker to pursue issues at the Board that had not been dealt with finally. [3 pages]

DECISION NO. 78/91I (22/02/91) Moore Rao Meslin

Rehabilitation, vocational (training).

The worker was entitled to sponsorship in a formal training programme. The Panel released this interim decision due to urgency. A final decision containing reasons and directions will be released at a later date. [3 pages]

DECISION NO. 108/91 (22/02/91) Onen B. Cook Preston

Disablement (nature of work).

A nursing assistant appealed a decision of the Hearings Officer denying entitlement for a shoulder condition. The worker began to experience pain in his shoulder in the spring of 1985 after about one year in a job that required regular lifting of patients. In December 1985, an impingement of the shoulder was diagnosed. The Panel found that the shoulder condition was a disablement from the nature of the worker's work. The appeal was allowed. [6 pages]

DECISION NO. 546/89 (25/02/91) McIntosh-Janis Beattie Meslin

Exposure (pesticides) (carbamate) - Exposure (pesticides) (organic phosphate) - Subsequent incidents (outside work).

The worker was exposed at work to organic phosphate pesticides nine time in 1984. She was exposed at work to carbamate pesticides twice in early 1985. She was exposed to organic phosphate pesticides in September 1985 outside work at a store at which she was shopping. The worker appealed a decision of the Hearings Officer denying entitlement for the exposure in September 1985.

Reactions to pesticides can be irritant reactions, toxic reactions based on the pharmacologic action of the pesticide, idiosyncratic reactions or allergic reactions. The only reaction that requires prior exposure or sensitization is an allergic reaction. Therefore, entitlement for the exposure outside work in September 1985 depends on a finding that the worker suffered an allergic reaction caused by prior sensitization at work.

A pharmacologic reaction usually involves nausea, headaches, seating and weakness. None of these symptoms were reported concerning the non-work exposure. A true allergic reaction would involve maximal eye irritation, nasal symptoms and throat irritation and could also include rash, swelling, hives, difficulty swallowing or breathing and change in voice. All these symptoms were noted in September 1985.

The Panel found that the evidence supported categorization of the worker's symptoms as an allergic reaction to organic phosphate pesticides to which the worker was sensitized because of work exposure in 1984. Therefore, the worker was entitled to benefits. The appeal was dismissed. [15 pages]

DECISION NO. 829/89 (25/02/91) Onen Robillard Jewell (dissenting)

Continuity (of treatment) - Credibility.

The worker suffered compensable low back injuries in 1975 and 1983. In 1986, the worker claimed entitlement to further benefits since the worker stopped working in 1984.

The majority of the Panel found that the worker did not experience back problems prior to 1975 and that the worker suffered a back injury in 1975 aggravated by the injury in 1983. Although he may have continued to experience symptoms after 1975, he was not disabled by them. He did not seek medical treatment after he stopped working in 1984 until he suffered acute back pain in 1986. The majority found that the worker was not entitled to benefits from 1984 but was entitled to benefits from 1986. The majority was satisfied that the compensable accidents caused deterioration of the worker's lumbar spine which led to the onset of symptoms in 1986. The appeal was allowed in part.

The Employer Member, dissenting, accepted evidence that the worker was suffering from back problems prior to the 1975 accident. Having rejected the worker's evidence with respect to the period from 1984 to 1986, the Employer Member would have rejected his evidence regarding back problems prior to 1975 as well. [11 pages]

DECISION NO. 9/91 (25/02/91) Signoroni Beattie Apsey

Chronic pain (marked life disruption) - Intervening causes (undermotivation).

The worker suffered a low back strain in July 1984 and received benefits until February 1985. The worker appealed a decision of the Hearings Officer denying entitlement for chronic pain. The worker claimed that he could not do anything due to constant low back pain.

The Panel agreed with the Hearings Officer regarding marked life disruption that the worker did not have much of a family and social life prior to the accident. Therefore, it could not be said that his family and social life changed significantly due to circumstances attributable to the compensable injury.

The worker repeatedly refused to undertake retraining for suitable employment. The worker's daily routine involved going from coffee shop to coffee shop from about 10 in the morning until 4 in the afternoon. He then stayed at home watching television until about 9 in the evening then went out until about 11. The worker managed financially on interest of about \$5,500 per year from money that he had previously saved. He rented a room for \$50 per week and spent an additional \$50 per week for everything else including food and clothing. The Panel found that some retraining was within the worker's reach but was not pursued because it clashed with his chosen lifestyle made possible by his savings and his ability to live with very limited resources. The Panel concluded that the worker's motivation was so low that it was an intervening cause.

The appeal was dismissed. [8 pages]

DECISION NO. 44/91 (25/02/91) Faubert McCombie Chapman

Jurisdiction, Tribunal (appealable issue).

The employer's representative wanted to appeal a decision of Regional Office of the Board requiring the employer to submit authorization for each individual case on which it represented the employer. The representative had submitted an authorization to the Board that it represented the employer on all workers' compensation matters.

The Tribunal did not have jurisdiction under s. 86g(1)(b) since this was an administrative matter which did not come within the requirement that the appeal be in respect of health care, vocational rehabilitation or entitlement. Although the matter was raised in the context of a s. 77 appeal, the employer and representative had received access, so that there was nothing to adjudicate under s. 77. [5 pages]

**DECISION NO. 57/91I (25/02/91) Hartman M. Cook Meslin
Kreller v. Tectum Ltd.**

*Section 15 application - Adjournment (conflict of interest) - Parties (representation)
(conflict of interest).*

A section 15 application was adjourned for a number of reasons, including: conflicting instructions to a representative from two clients; absence of one defendant, without whose presence it may be difficult to make a decision on the real merits and justice; insufficient notice of witnesses. [6 pages]

DECISION NO. 97/91 (25/02/91) Signoroni B. Cook Apsey

Withdrawal (of appeal).

The worker's appeal was withdrawn to allow the worker to pursue issues at the Board that had not been dealt with finally. [3 pages]

DECISION NO. 794/90 (26/02/91) Sandomirsky Robillard Nipshagen

In the course of employment (recreational activity) - Arising out of employment (recreational activity).

The worker suffered a fractured wrist during a ball hockey game which took place during an assembly line shutdown at work. The worker appealed a decision of the Hearings Officer denying entitlement for the injury.

The Panel reviewed various tests for determining whether an accident occurred in the course of employment and whether it arose out of employment. In this case, it was not necessary to determine each branch of the entitlement test separately. The Panel adopted the approach in Decision No. 24F to combine the two questions by asking simply whether there is a sufficient nexus between the accident and the employment. This approach can be used when all the critical facts are known and the presumption clause is not applicable.

The Panel concluded that the accident arose out of and in the course of employment, considering: the accident occurred on the employer's premises during regular working hours; playing ball hockey had been condoned by the employer for two years prior to the accident; it was to the employer's benefit to have the workers remain on the premises during shutdowns; the employer's rule against horseplay was never enforced against playing ball hockey.

The appeal was allowed. [9 pages]

WCAT Decisions Considered: Decision No. 24F (1990), 13 W.C.A.T.R. 1 apd; Decisions No. 674/89 consd, 351/90 consd, 405/90 consd
Board Directives and Guidelines: Operational Policy Manual, Document no. 03-02-02

DECISION NO. 966/90 (26/02/91) Signoroni Lebert Nipshagen

Chronic pain - Suitable employment.

The worker received benefits for an injury from September 1985 to November 1985 and for a recurrence from June 1986 to October 1987. The worker appealed a decision of the Hearings Officer denying entitlement for chronic pain and denying continuing temporary benefits.

On the evidence, the worker was able to do heavy work. There was an absence of assessable residual disability. The Panel found that the worker was not entitled to benefits for chronic pain. The worker also was not entitled to further temporary benefits. Since he refused suitable employment offered by the employer. The appeal was dismissed. [5 pages]

DECISION NO. 15/91 (26/02/91) Starkman B. Cook Jago*Delay (treatment).*

The worker appealed a decision of the Hearings Officer denying entitlement for a back injury which he claimed he suffered at work in June 1986 while trying to lift a heavy die. The worker's job was terminated in the beginning of July 1986 after a disagreement with a co-worker and his manager. The worker did not receive medical treatment until the middle of July. Considering the delay in treatment, the Panel found that the worker's back condition was not related to employment. The appeal was dismissed. [4 pages]

DECISION NO. 598/89 (27/02/91) Faubert Fox Seguin*Delay (treatment).*

The worker sustained a knee injury in 1976 when the lift truck that he was operating backed into a wall and platform. He was off work for periods in 1976 and 1977 due to the resulting knee injury. In 1977 he was awarded a pension for his knee. The worker sought benefits for a back condition which he claimed was related to the 1976 accident.

There was no record of the worker seeking treatment for a back condition until he consulted a chiropractor in 1984. There was no mention of back injury at the time of the worker's pension examination in 1977 or when the worker was interviewed by a WCB Investigator in 1984 with respect to the reopening of his claim. The worker had symptoms of degenerative disc disease. Thus, although the mechanics of the 1976 accident were such that the worker could have injured his back, and though there was evidence of back complaints given by a co-worker, the Panel was not satisfied that the worker injured his back in 1976, or that his low back condition after 1984 resulted from the 1976 accident. [10 pages]

DECISION NO. 387/90 (27/02/91) Moore Drennan Chapman*Hearing loss.*

The worker appealed a decision of the Appeal Board denying entitlement for hearing loss. On the evidence, the Panel found that the worker worked as a riveter in the fuel pump assembly department from 1968 to 1977 and that she was exposed to noise level of 94.6 decibels for three and one-half days per week during that period. This was sufficient exposure to entitle the worker to benefits under Board policy. The appeal was allowed. [7 pages]

WCAT Decisions Considered: 387/90L reld to

Board Directives and Guidelines: Claims Services Division Manual, s. 122, p. 270, Directive 19

DECISION NO. 666/90R (27/02/91) Onen Ferrari Apsey*Reconsideration - Reconsideration (error of facts).*

The worker requested that Decision No. 666/90 be reconsidered. That decision found that the worker did not suffer from a lung disability related to his employment.

The request for reconsideration was denied.

The question of the worker's entitlement for dermatitis was not dealt with at the original hearing as it was still under consideration at the Board and was not an issue on the appeal. A medical report submitted by the worker in support of the reconsideration request was not new evidence as it merely repeated evidence that was before the Panel at the original hearing. There was no need to review tests or x-rays as the medical reports before the Panel dealt with these materials in a clear and unambiguous manner. The recommendation of a doctor that the worker be removed to a less dusty area was considered by the original hearing Panel but it concluded that this was based on an abundance of caution rather than any positive finding of disability.

There were some factual errors in the original decision, but correction of those errors would not have led to a different decision being reached. [5 pages]

WCAT Decisions Considered: Decision No. 95R (1989), 11 W.C.A.T.R. 1 reld to; Decision Nos. 72R, 72R2

**DECISION NO. 729/90 (27/02/91) Onen McCombie Sutherland
Slaytor v. Emonts***Section 15 application - Schedule 1 employer - Class of employer (supplier of non-clerical labour).*

The employer carried on the business of supplying bird and animal control services to airports. The issue was whether the employer was a Schedule 1 employer. The employer submitted that it was in the business of supplying labour other than clerical within Class 20(1)(xiv) of Schedule 1.

The Board advised that the non-clerical labour category was designed to cover businesses engaged in the provision of a labour specific resource, such as personnel companies that make workers available for other than clerical needs, but that the employer in this case provided a service. The employer would have the same end product as traditional pest control operations, which were not covered by Schedule 1.

The Panel found that the employer was providing a full service rather than just labour. The Board's interpretation was not too restrictive. The classification was vague but to interpret it broadly enough to include a service such as that of the employer would undermine the Rate Group in which supplier of non-clerical labour class was included.

The Panel concluded that the employer was not a Schedule 1 employer. The plaintiffs' right of action was not taken away. [10 pages]

WCAT Decisions Considered: Decision No. 234/89 (1989), 12 W.C.A.T.R. 181 apld; Decision No. 729/90 reld to
Regulations considered: Reg. 951, Schedule 1, class 20

DECISION NO. 876/90 (27/02/91) Sandomirsky Beattie Nipshagen

Employer (construction) - Independent operator (construction) - Worker - Board Directives and Guidelines (construction industry worker) - Construction.

The spouse of a deceased worker appealed a decision of the Hearings Officer denying dependency benefits. The worker had an aluminum siding business. He died from electrocution when an aluminum ladder came into contact with high voltage wiring. The issue was whether the worker was a worker for purposes of the Act.

A homeowner hired a contractor to do some renovations, including installation of a new roof and eavestroughs. Most of the work was done by the contractor but the eavestroughs were installed by the worker. The worker gave an estimate to the homeowner. The invoice was sent to the contractor, forwarded to the homeowner and paid by the homeowner directly to the worker's widow.

Board policy provides that a person in the construction industry is considered to be a worker if the person works alone without employing other workers. The Panel agreed with Decision No. 503/87I that this policy was consistent with the Act.

In this case, the worker did not employ workers on a regular basis but he did employ other workers for this particular job. The worker hired himself out to many contractors and homeowners. This case was different than Decisions No. 503/87I and 1114/87 in which cases the workers in fact worked exclusively for one company and hired other workers to complete the jobs after the accidents.

The Panel concluded that the worker was not a worker within the meaning of the Act. The appeal was dismissed. [9 pages]

WCAT Decisions Considered: Decision No. 503/87I (1987), 6 W.C.A.T.R. 144 distd; Decision No. 1114/87 (1989), 11 W.C.A.T.R. 92 distd; Decisions No. 701/87I reld to, 478/90 consd

Board Directives and Guidelines: Claims Services Division Manual, s. 1(1)(z), p. 19, Directive 1

DECISION NO. 919/90 (27/02/91) Hartman Jackson Barbeau

Disablement (nature of work).

The worker was struck on the back of his arm in October 1975. In 1979, he was awarded a 3% pension for an elbow disability. In 1985, he was awarded a 20% pension for forearm, wrist and hand conditions, increased to 25% in 1987. In 1987, the employer objected successfully to initial entitlement. The worker appealed the decision of the Hearings Officer denying entitlement.

The Panel accepted the opinion of the majority of doctors that the blow in October 1975 was not related to the onset of median nerve or carpal tunnel symptoms. However, these conditions may have been related to the nature of the worker's work in 1976. Although it was not possible to determine precisely the worker's state prior to surgery in 1976, the Panel was satisfied that there was sufficient evidence to conclude that a causal relationship existed. The appeal was allowed in part. [8 pages]

DECISION NO. 7/91 (27/02/91) Moore Robillard Barbeau*Accident (occurrence).*

The worker appealed a decision of the Hearings Officer denying entitlement for a shoulder disability which the worker claimed resulted from an accident at work. The Panel found the worker to be a credible witness. In addition, there was corroboration of the worker's testimony from two former co-workers. The appeal was allowed. [5 pages]

DECISION NO. 29/91L (27/02/91) Sandomirsky McCombie Barbeau*Leave to appeal (substantial new evidence) (medical report).*

The worker applied for leave to appeal a decision of the Appeal Board denying continuing entitlement for facial nerve damage. The worker submitted new medical reports concerning neck and shoulder pain and spasms in his hands.

The new evidence did not address the issues before the Appeal Board. Leave to appeal was denied. The Panel noted that the worker could still pursue entitlement for these other conditions at the Board. [4 pages]

DECISION NO. 738/90 (19/02/91) Bigras Klym Meslin*Pensions (assessment) (chronic pain) - Pensions (Rating Schedule) (chronic pain) - Chronic pain (Rating Schedule) - Board Directives and Guidelines (chronic pain) (Rating Schedule).*

The worker, now aged 41, suffered a back strain in 1983. She was examined by a Board team for chronic pain disability in 1988 and a 15% pension was recommended. That award included the organic and psychogenic components of the disability. The worker sought a higher pension.

The worker's evidence was that she had difficulty remaining seated for more than 15 to 20 minutes and could not walk for any length of time. She was able to attend church regularly, use public transportation, and do some shopping. However, she had curtailed social activities such as church picnics. The worker needed help with bathing and dressing and could not do physically demanding chores such as laundry or washing floors. She could cook meals and intended to take upgrading courses at school to learn food preparation. She was hopeful of finding light work.

The Board rating team, in 1988, placed the worker in the mid-range of the severe classification under the Board's Rating Schedule for Chronic Pain Disability. The Panel found that this rating was reasonable and that the worker's condition had not changed since then. According to that Rating Schedule, 15% was appropriate for the worker's degree of impairment. However, in October 1990, the Board abolished the Chronic Pain Disability Rating Schedule and decided to adopt the Psychotraumatic Disability Rating Schedule with respect to chronic pain.

The Panel found that a disability in the mid-severe range, in the present circumstances, would fall in the middle of Category 2 of the new rating schedule (moderate impairment of the total person) and that the appropriate pension rate was thus 20%. [12 pages]

WCAT Decisions Considered: Decision No. 915 (1987), 7 W.C.A.T.R. 1 reld to
Board Directives and Guidelines: Operational Policy Manual, Document no. 03-03-03; Chronic Pain Disability Policy, Board Minute 2, July 3, 1987, p. 5196

DECISION NO. 247/89 (27/02/91) Kenny Drennan Kowalishin

Pensions (assessment) (hand) - Pensions (assessment) (irrational fear).

The worker suffered a serious crush injury to his hand in 1980 that resulted in four fractured metacarpals. Recovery was good and the worker returned to his regular employment but ended up only working sporadically after the injury. Pension assessments in 1986 and 1987 noted thickening of the dorsum and some discomfort, but resulted in 0% awards, as there was normal wrist movement and no functional abnormality.

After the hearing, the Panel asked the Board to reassess the worker. The examiner found full finger movement, no muscle wasting, and no crepitus on passive movement of the wrist. There was some weakness of grip, subjective pain on ulnar deviation and some limitation of dorsiflexion of the wrist. The losses of grip and movement were small. The post-hearing examiner recommended a 2% pension and the Panel accepted that rating as appropriate.

The worker had a genuine fear of the bone bursting out of the back of his hand if he applied extra pressure to the wrist or hand. None of the medical reports said that this would occur. There was no basis for an increase to the worker's rating to take this eventuality into account. [7 pages]

WCAT Decisions Considered: 173/90 reld to

DECISION NO. 561/90 (27/02/91) Kenny Robillard Apsey

Disablement (nature of work) - Overuse syndrome - Postal workers (letter carrier).

The worker, a letter carrier, woke up one morning with a swollen right hand. Pain began to travel up her arm to her shoulder and her hand became numb. The sensation returned to her hand within a couple of weeks but the arm pain continued and prevented her from working. The worker returned to light work four months later and then to regular full-time work after another few weeks. Arm and shoulder pain persisted, however, and she left the job six months after her return to work. The worker had been receiving chiropractic treatment for neck pain and stiffness for several years prior to this onset of arm pain.

All doctors agreed that the initial hand swelling and numbness did not result from the job and the Panel accepted that opinion. It was acknowledged that the ongoing arm symptoms were generally of the type that could be associated with the worker's job, however, medical opinion was divided as to whether, in this instance, the worker's arm symptoms resulted from her job. It was agreed that if the arm and shoulder problems were job-related, it would be because the job created an overuse situation.

The worker experienced a sudden onset of symptoms, rather than experiencing a history of similar symptoms of increasing severity which is characteristic of overuse syndrome. The worker had not previously had hand symptoms, forearm pain or all-arm pain. Her prior neck and back treatment involved problems of a different nature. The worker's job was not a cause of the hand and arm disability. [10 pages]

DECISION NO. 858/90 (28/02/91) Faubert McCombie Apsey
Wilson v. Kuruc

Section 15 application - In the course of employment (distinct departure test) - Evidence (inconsistencies) (examination for discovery).

The defendants in a civil case applied to determine whether the plaintiff's right of action was taken away. The plaintiff was a driver who delivered take-out food. The issue was whether he was in the course of employment at the time of a motor vehicle accident. The plaintiff claimed that he had completed his last delivery of the day and was going home before returning the employer's vehicle to the employer's premises.

Considering inconsistencies between the plaintiff's evidence at the hearing and at examination for discovery, the Panel could not find that the plaintiff intended to go home before returning to the restaurant. In any event, it could not be determined from the evidence that the plaintiff had deviated from his route at the time of the accident.

The plaintiff was in the course of employment. His right of action was taken away. [8 pages]

Cases Considered: Meyer v. Ontario (WCB), (March 25, 1988) (Ont. C.A.) (unrep.)

DECISION NO. 588/89I (04/03/91) Carlan Beattie Meslin

Schedule 1 employer - Class of employer (worm picking) - Class of employer (farming) - Class of employer (wholesale mercantile business) - Jurisdiction, Board (class of employer) (standard of review).

A worm picker appealed a decision of the Hearings Officer denying entitlement. The Hearings Officer found that the employer was not covered by the workers' compensation scheme.

The worm picking industry is of significant proportions and relatively unregulated. In Decision No. 417, a panel previously found that worm picking was not an industry within Schedule 1. The Board includes worm picking as an "application industry" which allows companies to opt for coverage.

The worker submitted that rate groups should be interpreted broadly to include as many workers as possible in the compensation system and that the Panel should not adopt the high standard of review of the Board's classification decisions that was adopted in Decisions No. 417 and 46/87.

The worker submitted that worm picking would come within farming in class 27 or operation of a wholesale mercantile business in class 25. The Board found that farming involved cultivation of a crop and that it was insufficient simply to harvest a product from the ground. The Board also found that a wholesale operation involved both purchase and resale of products.

The Panel found merit in both the worker's submissions and the decisions of the Board. Both the Tribunal and the Board have previously found that worm picking did not fit into the existing classes in Schedule 1. The Panel agreed with Decision No. 46/87 that it should interfere with assessment decisions only when the Board has acted unreasonably or has relied on an unsupportable definition.

In this case, the Board's interpretation was reasonable. The Panel concluded that worm picking was not included in Schedule 1. A further hearing would be held to hear the worker's submissions regarding the Charter of Rights. [11 pages]

WCAT Decisions Considered: Final Decision No. 417 (1986), 3 W.C.A.T.R. 154 apId; Decision No. 46/87 (1987), 4 W.C.A.T.R. 319 apId
Regulations considered: Reg. 951, s. 1, class 25, class 27

DECISION NO. 1047/89 (04/03/91) Carlan Lebert Clarke

Psychotraumatic disability - Headaches - Significant contribution (of compensable accident to psychological condition) - Credibility (lay off) - Jurisdiction, Tribunal (equitable jurisdiction) - Time limits (appeal) - Overpayment.

The worker sustained a cut and bruising on his cheek when grazed by a falling table in May 1982. He saw a doctor a week after the accident, but continued working until he was laid off at the end of July 1982 because of a seasonal work shortage. The worker's condition consisted of ongoing headaches. The Board eventually granted the worker's claim on the basis that he suffered a psychological or emotional disability when the accident aggravated an underlying vulnerable personality.

The worker sought temporary benefits for a period from July 1982 to May 1985. He also appealed the level of his 15% provisional three-year pension and the fact that it was not made permanent. On receiving notice of the worker's appeal, the employer cross-appealed as to initial entitlement though it had never before disputed that issue in the seven years following the accident.

The Panel found that there was no reason not to consider the employer's appeal even at this late stage. However, the Panel was not prepared to change the finding that an accident had occurred as no evidence was adduced to discredit the evidence that the worker had given previously and that had been accepted in prior proceedings.

The Panel found that the worker did not sustain an organic brain injury at the time of the accident. The majority of doctors found no significant head injury and concluded the headaches were not organic in origin. An organic injury would likely have led to severe disablement from the outset rather than the progressively worsening condition reported by the worker. The timing of the increase in complaints and of first reporting the accident, which occurred at a time when lay-off was imminent, could not be ignored.

The Panel found that the work accident was not a significant factor in the development of the worker's emotional disability, though it may have given him a focus for his anxiety. The loss of the worker's job due to the seasonal lay off and the worker's adjustment to a strange country (he had arrived in Canada in 1981) with a limited social support system were identified as major factors by the treating physicians. The worker thus was not entitled to benefits for his headaches or his emotional disability.

The worker argued that since he had become dependent on a support system that had been provided to him in good faith, he was entitled to additional benefits on an "equitable" basis. Equitable jurisdiction is applicable only to courts of law. Administrative tribunals are bound to follow their governing statutes in making their decisions. The Tribunal was limited to granting compensation in ways prescribed by the Act.

This decision resulted in a large overpayment. However, the Panel directed the Board not to recover the overpayment as it was the result of a mistake by the Board rather than any fraudulent action by the worker. Furthermore, it was unlikely that the money could be recovered as the worker was no longer living in Canada. The costs of the claim should be removed from the employer's record. [14 pages]

Cases Considered: Review of Decision No. 72 (1988), 12 W.C.A.T.R. 85 at 152 (WCB Bd. of Directors) distd

DECISION NO. 186/90 (04/03/91) Bradbury B. Cook Apsey*Accident (occurrence) - Evidence (inconsistencies).*

The employer appealed a decision of the Hearings Officer granting benefits for an accident in January 1988. Based on inconsistencies in the worker's testimony and on inconsistencies between her evidence and the documentary evidence, the Panel found that the worker did not suffer the back injury at work. The appeal was allowed. [8 pages]

WCAT Decisions Considered: 232 reld to, 846 reld to, 769/89 reld to, 186/90 reld to

DECISION NO. 219/90 (04/03/91) Signoroni Drennan Meslin*Delay (reporting injury).*

On March 9, 1987 the worker's bench collapsed causing him to fall into the grinder that he was operating. He suffered a burn to his arm for which he received first aid treatment at work on March 9 and medical treatment on March 11. The worker claimed that after he fell into the grinder, he fell into a cabinet resulting in a back injury which caused him to discontinue employment for one day on March 11 and for several weeks on March 17.

The evidence of the worker's doctor was that the worker did not complain of back pain until March 17, even though the worker had visited the doctor's office on March 11 with respect to the arm burn. The doctor also did not recall being asked by the worker not to report a compensation claim, contrary to the evidence of the worker. The doctor's evidence could not be reconciled with several aspects of the worker's testimony but coincided with the evidence of the employer's witnesses. The worker's appeal was dismissed. [5 pages]

DECISION NO. 728/90 (04/03/91) Kenny Robillard Apsey*Continuity (of treatment).*

In February 1959, a tree fell across a lumberjack's back from a height of about eight feet. He received benefits until April 1959. In 1980, he claimed further benefits. The worker appealed a decision of the Hearings Officer denying further entitlement to benefits.

The worker suffered a serious accident. Although an orthopaedic surgeon reported that the worker made a remarkable recovery, he felt that there may have been some intervertebral disc involvement. There was some evidence of continuity of treatment over the years. Some gaps in treatment may be explained by a number of other problems that affected the worker. There was persuasive evidence from the worker's three sons of the worker's back problems from the time of their earliest memory.

The Panel found that the 1959 accident was a significant cause of the worker's disability. The appeal was allowed. [12 pages]

DECISION NO. 120/91 (04/03/91) McCombie Lebert Nipshagen*Accident (occurrence).*

The worker appealed a decision of the Hearings Officer denying entitlement. Due to mechanical problems with a shunt truck which the worker was driving, a co-worker bumped him into the garage with another truck.

On the evidence, the worker suffered headaches, nausea and loss of balance as a result of the bumping and was off work for two months. His condition was diagnosed as cervical strain and post-traumatic vertigo. Concerns about the compensability of the loss of balance appeared to divert the Board's attention. The Panel found that the loss of balance was related to the accident. Even if it was not, the worker was entitled to benefits for the two months on the basis of the cervical strain. The appeal was allowed. [8 pages]

DECISION NO. 94/90I (05/03/91) Strachan Robillard Apsey*Parties (interest of employer) - Standing (rate group) - Intervenor - Corporation (amalgamation).*

A company applied for standing in an appeal by a worker from a decision denying entitlement. The worker was employed by Company 1. Company 1 was part of the operations of Company 2. Company 2 was acquired by Company 3. Company 3 amalgamated with Company 4 to form Company 5. Company 5 was purchased by Company 6, which subsequently changed its name to Company 7. Company 7 applied for standing in the appeal.

The Board's file for Company 3 was closed. The employer of record according to the Board files was Company 5. The Board had no record of many of the corporate changes that had occurred.

The Tribunal generally has granted standing as of right to parties named by the Board in the claim or to parties who have a direct pecuniary interest in the outcome of the appeal. However, it is also possible for parties to have standing because of a significant interest in the outcome of an appeal even though the parties may not have a direct pecuniary interest.

In this case, Company 7 did not have a significant interest in the outcome of the appeal. Correspondence with the Board confirmed that any costs associated with the appeal were isolated in the defunct Company 3 assessment file and would be transferred to the Administrative Fund to be applied to the rate group. The costs would not appear on the record of Company 5 or Company 7. In addition, Company 7 was a participant in the NEER experience rating program. According to this plan, costs of a claim are charged in the year of the accident. Again, in this case, the costs would be charged to the rate group. The interest of Company 7 as a member of the rate group was too remote to justify standing as of right.

The Tribunal has discretion to grant intervenor status. This case does not involve a new or unique issue. It has been dealt with in previous decisions. In the circumstances, an intervenor was not required or even desirable.

The Panel noted s. 124 regarding employer committees. The Panel was unaware of any situation in which an employer committee had been appointed. Even if Company 7 was representative of such a committee, the same principles would apply in determining whether to grant standing.

The application was denied. [7 pages]

WCAT Decisions Considered: Decision No. 72 (1986), 2 W.C.A.T.R. 28 *reld to*; Decision No. 915 (1987), 7 W.C.A.T.R. 1 *reld to*; Decision No. 924/89 (1990), 14 W.C.A.T.R. 228 *reld to*; Decisions No. 356 *reld to*, 107/87 *consd*, 433/87 *reld to*, 944/87LR *reld to*, 823/88 *reld to*, 55/89I *consd*, 311/89 *consd*

Cases Considered: *Re Saanich Inlet Preservation Society and Cowichan Valley Regional District* (1983), 147 D.L.R. (3d) 174 (B.C.C.A.) *reld to*

DECISION NO. 502/90 (06/03/91) Moore B. Cook Preston

Epicondylitis - Aggravation (preexisting condition) (osteochondritis) (asymptomatic) - Recurrences (compensable injury) (elbow).

The worker suffered a tennis elbow injury at work while pulling a heavy cart in February 1987. She was awarded benefits up to August 1987. She continued to experience elbow pain and dysfunction after termination of her benefits.

The worker injured her right elbow in a roller skating accident in 1978. She seemed to have recovered from that injury, but a degenerative condition (osteochondritis dessicans) resulted.

Two doctors were of the view that the work injury aggravated the preexisting degenerative condition. They felt that the work injury was no longer symptomatic, but its effect was to make the previously asymptomatic degenerative condition symptomatic.

Three other doctors were of the view that the worker's preexisting degenerative condition had prolonged the healing of the work injury. The work injury thus continued to disable the worker because the underlying degenerative condition continued to have an interactive effect on the work injury.

On either view, the worker was entitled to benefits for recurrences of her elbow disability after August 1987. All of the doctors concluded that the work injury continued to contribute in a significant way, either directly or indirectly, to the worker's ongoing disability. [9 pages]

DECISION NO. 129/91 (06/03/91) McCombie Jackson Barbeau

Access to worker file, s. 77.

Access to the worker's file was granted to the employer, except for one sentence which was not relevant. [3 pages]

DECISION NO. 130/91 (06/03/91) McCombie Jackson Barbeau

Access to worker file, s. 77.

Access to the worker's file was granted to the employer. [3 pages]

DECISION NO. 131/91 (06/03/91) McCombie Jackson Barbeau

Access to worker file, s. 77.

Access to the worker's file was granted to the employer. [3 pages]

DECISION NO. 167/89 (07/03/91) Strachan Jackson Nipshagen

Temporary disability (beyond pension level) - Suitable employment - Overpayment.

The worker suffered an arm injury for which he was awarded a 20% pension. The worker appealed denial of temporary benefits from February 1982 to January 1983. The employer appealed granting of full temporary benefits from January 1983 to June 1983.

On the evidence, the worker was not disabled beyond his pension level from February 1982 to January 1983. The worker's appeal was dismissed. However, an overpayment should be transferred to the Administrative Fund since the principal cause of the overpayment was lack of administrative control by the Board.

From January 1983 to June 1983, the worker was available for modified work but no light work was available. Therefore, he was entitled to full benefits. The employer's appeal was dismissed. [6 pages]

DECISION NO. 63/91 (07/03/91) Sandomirsky Lebert Meslin

Continuity (of treatment) - Disablement (strenuous work) - Postal workers (letter carrier).

A letter carrier suffered compensable neck and shoulder problems in June 1975. In September 1975, he was transferred to a lighter business delivery route. In 1985, he returned to a heavier residential route. He stopped work in October 1987 due to shoulder and upper back problems. The worker appealed a decision of the Hearings Officer denying entitlement to benefits in 1987.

The worker's condition in 1987 was not related to the 1975 accident, considering lack of continuity of treatment, lighter job performed in the intervening years and a non-compensable neck injury suffered in a motor vehicle accident in 1984.

The worker's condition was not related to the heavier nature of his work since 1985. Rather, his condition was related to non-compensable motor vehicle accident and a degenerative condition.

The appeal was dismissed. [5 pages]

DECISION NO. 67/91 (07/03/91) Robeson Beattie Apsey

Access to worker file, s. 77.

Access to the worker's file was granted to the employer, except for specific sentences from a number of reports which were not relevant. [4 pages]

DECISION NO. 155/90R (08/03/91) Onen Robillard Apsey

Reconsideration - Damages, contribution or indemnity.

The worker's request to reconsider Decision No. 155/90 was denied. Section 8(11) was intended to provide relief to co-defendants who do not enjoy immunity from action under the Act. It applies to defendants who are not employers. [4 pages]

WCAT Decisions Considered: 155/90 consd

DECISION NO. 465/90 (08/03/91) Onen Higson Apsey

Disc, degeneration (cervical) - Board Directives and Guidelines (chronic pain) - Chronic pain.

The worker had accidents at work in 1965, 1970, 1980 and 1981. He was currently receiving a 25% low back pension for the 1981 accident. The worker sought entitlement for a neck disability, entitlement for chronic pain and an increase in the 25% pension rating.

The Panel found that the worker was entitled to a pension for his neck disability commencing with his termination of employment in 1981 since the 1965 accident was a significant contributor to that disability. X-rays taken in 1965 showed a normal spine. Subsequent examinations showed degenerative changes to the cervical spine. This pointed to the conclusion that the 1965 accident could have started the degenerative changes. The worker obtained medical treatment for his neck in 1972 and at that time he related the neck injury to a work injury. The worker was a credible witness. The pension rating was left to be determined by the Board, as was the possibility of entitlement prior to 1981.

The worker suffered work-related injuries to his neck and low back and the resulting pain lasted for more than six months, as required by Board policy for entitlement to chronic pain. However, the Panel was not satisfied that the worker met the requirements of the policy that the pain last for six months beyond the usual healing period for the injury and that the pain must be disproportionate to the degree of organic injury. The medical evidence showed that the worker suffered from a condition that had no possibility of healing. It also established that the worker suffered from an organic injury which reasonably explained his complaints of pain. Even if a component of the worker's pain were attributable to chronic pain, the majority of complaints could be explained by organic factors. It was thus appropriate that his disabling pain, from all sources, be compensated under the rating schedule for organic impairment.

The Panel found that the 25% rating was appropriate at the time that it was assessed in 1986. However, as there was evidence of subsequent deterioration, the Panel directed that the Board conduct a further assessment with respect to the low back injury. [12 pages]

WCAT Decisions Considered: Decision No. 915 (1987), 7 W.C.A.T.R. 1 consd

Board Directives and Guidelines: Chronic Pain Disability Policy, Board Minute 2, July 3, 1987, p. 5196

DECISION NO. 914/90 (08/03/91) Chapnik Lebert Meslin

Delay (onset of symptoms).

The worker suffered compensable low back injuries in 1976, 1978, 1980 and 1982. The worker appealed a decision of the Hearings Officer denying entitlement for a cervical disability which the worker related to the 1982 accident.

The worker was not entitled to benefits for the cervical condition. There was a delay in onset of symptoms until 1984. The Panel found that the neck condition was related to preexisting degenerative disc disease. The appeal was dismissed. [7 pages]

DECISION NO. 5/91 (08/03/91) Hartman Jackson Nipshagen

Supplements, temporary (rehabilitative purpose) - Rehabilitation, vocational (cooperation).

The worker suffered a compensable injury for which he was awarded a pension. He received a supplement from May 1986 to January 1989. The worker appealed a decision of the Hearings Officer denying a supplement from January 1989 to July 1989.

On the evidence, the failure of the worker to be rehabilitated was not due to the compensable disability but, rather, to self-imposed restrictions as to what constituted suitable employment. The appeal was dismissed. [7 pages]

DECISION NO. 25/91 (08/03/91) Hartman Lebert Chapman

Temporary disability (beyond pension level).

The worker suffered a knee injury in September 1986. Initially, he received temporary total disability benefits until April 1987. Subsequent decisions of the Board resulted in termination of benefits in November 1986. However, the Board decided not to recover the overpayment. The worker received a 5% pension retroactive to April 1987. The worker appealed denial of temporary total disability benefits from November 1986 to May 1987.

Since the worker received benefits from November 1986 to April 1987 which were not recovered by the Board, the only period in issue was actually April to May 1987. On the evidence, the worker was not disabled beyond his pension level during this period. The appeal was dismissed. [9 pages]

DECISION NO. 104/91 (08/03/91) Faubert Lebert Nipshagen

Jurisdiction, Tribunal (final decision of Board) - Withdrawal (of appeal).

The employer was appealing a decision of the Hearings Officer denying the employer relief from costs of the worker's claim. At the hearing, the employer requested that the Panel consider the appeal on the basis

that benefits were paid to the worker improperly. The Panel found that this issue had not been considered by the Hearings Officer. The employer did not want to pursue the issue of SIEF relief. The appeal was considered withdrawn. [7 pages]

DECISION NO. 106/91 (11/03/91) Faubert Lebert Nipshagen

Disablement (change in work).

The worker appealed a decision of the Hearings Officer denying entitlement for right shoulder pain which began on January 17, 1988. The worker worked as a packer, constructing large packing boxes. From January 12 to January 15, 1988, the worker drove a forklift truck. He submitted that his shoulder condition was related to his work driving the forklift.

The worker did not suffer any shoulder pain while operating the forklift. Rather, he awoke with pain on January 17. There was very little reaching involving the arm or shoulder area required to operate the forklift. There was an absence of medical evidence connecting the work performed and the disability. The appeal was dismissed. [7 pages]

Board Directives and Guidelines: Claims Services Division Manual, s. 1(1)(a), p. 1, Directive 2

DECISION NO. 125/91 (11/03/91) Onen B. Cook Clarke

Continuing entitlement - Credibility (continuity).

The worker sustained a compensable back injury in 1972 while attempting to lift a 200 pound weight by himself. The worker received hospital treatment at the time, but he returned to work in January 1973 and thereafter performed various jobs which appeared to involve physical capacity. He did not receive further medical treatment until 1986. The worker suffered two accidents after 1972. Following a 1981 accident involving his back, he received chiropractic treatment.

Despite these reasons for concluding that the 1972 injury was not related to the worker's current back complaints, the Panel concluded that his evidence answered the questions raised by these factors and granted him benefits.

The worker continued to experience back discomfort after 1973 which limited the work that he could do. His condition had remained stable since 1973. The two subsequent injuries did not affect the worker's back. The 1981 chiropractic treatment was for the worker's ongoing back problems. He had received traditional remedies for treatment since 1973. The worker did not communicate well in English and did not understand that he could claim for additional entitlement, notwithstanding his return to work, until speaking to a community health counsellor. [6 pages]

DECISION NO. 907/90 (12/03/91) Chapnik Felice Preston

Continuing entitlement - Disability (disabled from working).

The worker suffered a shoulder and back injury in July 1984 and received benefits until February 1985. The worker appealed a decision of the Hearings Officer denying continuing entitlement.

The preponderance of medical evidence supported the conclusion that the worker was able to return to his regular work by February 1985. Any continuing pain or discomfort was not disabling. The appeal was dismissed. [6 pages]

DECISION NO. 10/91 (12/03/91) Hartman Drennan Jago

Evidence (inconsistencies) (description of accident) - Disablement (repetitive work).

The worker appealed a decision of the Hearings Officer denying entitlement for a neck, upper back, right shoulder, right forearm and right wrist condition. The worker operated a spindle winding machine. She submitted that her condition was either a chance event or a disablement.

The worker was not entitled to benefits on the basis of a chance event, considering numerous inconsistencies in the description of the accident. She was also not entitled to benefits on the basis of disablement. She had been performing the same job for at least five years. Although the work was repetitive, it did not appear consistent with the onset of symptoms and the diagnoses of her condition.

The appeal was dismissed. [9 pages]

DECISION NO. 75/91I (12/03/91) Sandomirsky Ferrari Jago

Chronic pain (marked life disruption) - Board Directives and Guidelines (chronic pain) (marked life disruption) - Adjournment (Board submissions).

The worker appealed a decision of the Hearings Officer denying entitlement for chronic pain. The Panel had seemingly conflicting statements from the Board regarding the requirement of establishing marked life disruption for entitlement now that the new Rating Schedule for chronic pain is being applied.

The Panel could not determine whether the requirement of marked life disruption had been eliminated. If it was eliminated, is level of impairment based on behavioral measurement criteria set out in the new Rating Schedule. If it was not eliminated, what is the relationship between marked life disruption and the behavioral measurement criteria in the new Rating Schedule.

The hearing was adjourned in order to request submissions from the Board. [8 pages]

WCAT Decisions Considered: Decision No. 915 (1987), 7 W.C.A.T.R. 1 reld to
Board Directives and Guidelines: Chronic Pain Disability Policy, Board Minute 2, July 3, 1987, p. 5196;
Report on the Changes to the Chronic Pain Disorder Policy, Board Minute 10, October 5, 1990, p. 5398

DECISION NO. 119/91 (12/03/91) Bradbury Beattie Barbeau*Continuity (of treatment).*

The worker suffered a shoulder injury in 1979 when he was struck by a frame and received benefits for one week. The worker appealed a decision of the Hearings Officer denying entitlement for his shoulder condition in 1985.

Board doctors found little likelihood of a relationship between the accident and the condition in 1985, based on the original minor accident and lack of continuity. The worker's treating doctors were of the opinion that the trauma to the shoulder in 1979 together with evidence of necrosis indicated a relationship between the original accident and the later problems. These doctors did not think that the five year delay before development of more serious problems was sufficient to deny a relationship.

Based on all the evidence, the Panel found that the worker's shoulder condition in 1985 was related to the compensable accident. The appeal was allowed. [7 pages]

DECISION NO. 123/91 (12/03/91) Faubert Jackson Meslin*Penalties - Board Directives and Guidelines (penalty assessments) (distortions) -
Board Directives and Guidelines (penalty assessments) (improved record).*

The employer appealed a decision of the Hearings Officer confirming a penalty assessment for the years 1983-85. The employer submitted that the assessment should be cancelled on the basis of distortions and improved safety record.

A claim that originated in 1981 accounted for 60% of the employer's costs in 1983 and 40% of the costs in 1984. A claim that originated in 1984 resulted in 40% of the employer's costs in 1985. The Panel did not agree with the employer that inclusion of costs of accidents that occurred in previous years was unfair or inappropriate. In any event, even if the costs of these two claims were removed, the employer would still be in a deficit position for each of the years under consideration.

The employer's accident costs decreased in the three years following the period under consideration. However, apparently the employer was unaware of its obligations to take active steps in the health and safety area until 1987 and it did not institute a health and safety committee until 1989. Although its costs decreased in the three years following the period in issue, the number of accidents exceeded the rate group for those years. The Panel was not satisfied that the employer took speedy and active steps to improve safety. Improvements since 1989 were too remote to warrant relief for 1983-85.

The appeal was dismissed. [9 pages]

WCAT Decisions Considered: Decision No. 598/87 (1987), 6 W.C.A.T.R. 183 consd

Regulations Considered: Reg. 951, s. 6

Board Directives and Guidelines: Additional Assessments Policies and Procedures, Board Minute 6, January 14, 1975, p. 4419

DECISION NO. 47/89 (13/03/91) Strachan Drennan Meslin

Rehabilitation, vocational (cooperation).

The worker suffered compensable injuries for which he was awarded a 10% pension. The employer appealed a decision of the Hearings Officer confirming temporary benefits for some periods and a pension supplement for another period.

On the evidence, the worker was partially disabled during the periods in question. The worker did not demonstrate initiative or significant motivation in vocational rehabilitation. However, he cooperated with the Board to a sufficient degree to meet the cooperation threshold. The appeal was dismissed. [7 pages]

**DECISION NO. 622/89 (13/03/91) Sperdakos Robillard Meslin
Kimsto v. Papaleo**

Section 15 application - Jurisdiction, Tribunal (section 15) (dependants).

The Panel did not have jurisdiction to determine whether the right of action of the plaintiff's wife was taken away. Since the plaintiff worker was alive, the wife did not come within the definition of dependants. [5 pages]

WCAT Decisions Considered: 1000/89 apld

Other Statutes Considered: Family Law Act, 1986, S.O. 1986 c.4

DECISION NO. 215/90 (13/03/91) Strachan B. Cook Apsey

Permanent disability - Supplements, older worker.

The worker suffered back injuries for which he was awarded a 20% pension. He appealed a decision of the Hearings Officer denying an increase in the pension.

The evidence indicated that there was both an organic and a non-organic basis for the worker's disability. The worker was referred back to the Board to be reassessed on a whole person basis.

In addition, the worker was entitled to an older worker supplement until July 1989.

The appeal was allowed. [4 pages]

DECISION NO. 749/90 (13/03/91) Chapnik B. Cook Shuel

Supplements, older worker (age) - Rehabilitation, vocational (benefit for older worker).

The worker suffered hand and back injuries for which he was awarded pensions totalling 25%. After an aggravation, he received temporary benefits until July 1985. The Hearings Officer granted an older worker supplement from June 1988, when the worker turned 55, until July 26, 1989, but denied the older worker

supplement prior to June 1988. The worker appealed denial of the older worker supplement from July 1985 to June 1988.

The Panel found that the worker could be considered an older worker even though he was only 52 years old in 1985. His impairment of earning capacity was significantly greater than is usual, considering his age and inability to undertake physical activity for which he was trained.

By July 1985, an extensive rehabilitation effort would have been required before the worker would have been ready for alternative employment, considering his age, limited job skills and disabilities. It would have been unreasonable to ask the worker or the Board to undertake such an effort when the results would be for a relatively short term. In the circumstances, it was reasonable for the worker to retire with the assistance of an older worker supplement.

The appeal was allowed. [11 pages]

WCAT Decisions Considered: Decision No. 112 (1986), 3 W.C.A.T.R. 54 *reld to*; Decision No. 320/88 (1988), 9 W.C.A.T.R. 292 *apld*
Board Directives and Guidelines: Claims Adjudication Branch Procedures Manual, Document no. 33-20-17; Operational Policy Manual, Document no. 05-03-09

DECISION NO. 868/90 (13/03/91) Sandomirsky Robillard Jago
Rouleau v. Kempton

Section 15 application - Independent operator (truck driver) - Worker (test) (business reality) - Worker (test) (organization test) - Employer - Out of province.

The defendants in a civil case applied to determine whether the plaintiff's right of action was taken away.

The plaintiff was a truck driver in the course of employment at the time of a motor vehicle accident. The plaintiff drove exclusively for one company. The tractor was owned by the plaintiff but was registered in the name of the company. The company also held the PCV licence. The tractor carried the company colours.

The plaintiff did not have a risk of profit or loss. There was considerable control from the company. Considering the business reality and organization tests, the Panel found that the plaintiff was a worker and not an independent operator.

The defendant driver drove exclusively for the defendant transport company but he was paid by a personnel company. The Panel found that the driver was an integral part of the transport company and that the transport company was the employer.

The defendant driver was a resident of Quebec. However, he drove regularly in Ontario and his employer reported to the Ontario Board for hours its employees drove in Ontario. The Panel found that the driver had a sufficient connection with the province of Ontario.

The plaintiff and defendant was both workers of Schedule 1 employers in the course of employment. The plaintiff's right of action was taken away. [12 pages]

WCAT Decisions Considered: Decision No. 111/90 (1990), 14 W.C.A.T.R. 253 *apld*; Decisions No. 456 *reld to*, 940/88 *consd*
Board Directives and Guidelines: Determination of Worker/Independent Operator Status: Impact of the Organizational Test, Board Minute 8, December 6, 1990, p. 5410
Cases Considered: *British Airways v. Workers' Compensation Board* (1985), 17 D.L.R. (4th) 36 (S.C.C.) *distd*; *The Queen in right of Manitoba v. Air Canada*, [1980] 2 S.C.R. 303 *distd*

DECISION NO. 855/89 (14/03/91) Strachan Felice Clarke*Delay (onset of symptoms).*

The worker appealed a decision of the Hearings Officer denying entitlement for a back disability which the worker related to an accident in October 1974 regarding which the worker reported that he injured his right arm and hand, head, rib area, both knees and hip. Considering delay in onset of back symptoms until 1977, the Panel found that the back condition was not related to the accident. The appeal was dismissed. [6 pages]

DECISION NO. 1044/89 (14/03/91) Bigras Beattie (dissenting) Nipshagen*Accident (occurrence) - Chance event - Disablement (strenuous work) - Preexisting condition (disc degeneration).*

The worker appealed a decision of the Hearings Officer denying entitlement. The worker was a bakery employee. He claimed that, in February 1987, he was pushing a cart, which could weigh up to 700 pounds, when the cart got stuck in a crack in the floor. When he gave a heavy push to move the cart, he felt a sharp pain. The worker claimed benefits on the basis of a chance event or disablement.

The majority of the Panel found that the worker did not sustain a sudden injury. The worker did not report such an injury immediately. There were no signs of any problem until five months later in July 1987, when the worker's doctor recommended a reduction of hours, and the worker did not stop working until September 1988. The worker did not tell his doctors of a specific incident.

The majority also found that the worker did not suffer a disablement. The worker had performed this heavy work for over seven years. He had a preexisting back condition. In July 1987, the worker's doctor recommended a reduction in hours but did not remove the worker from his job. The preexisting back problem resulted in pain when taxed by the heavy nature of the worker's job. It could not be said that the work affected the worker's back but, rather, that the worker's preexisting back condition affected his work. If the doctor felt that the work was causing the injury, he would have ordered the worker to stop working.

The majority concluded that the worker was not entitled to benefits. The appeal was dismissed.

The Worker Member, dissenting, found that the worker suffered a sudden onset of pain while pushing the cart that got stuck on a crack in the floor. The worker sought medical treatment after February 1987. It appeared to the Worker Member that the employer intimidated co-workers as to what they should say. [13 pages]

Cases Considered: Review of Decision No. 72 (1988), 12 W.C.A.T.R. 85 at 152 (WCB Bd. of Directors) *reld to*

DECISION NO. 119/90 (14/03/91) Bigras Klym Ronson

*Pensions (assessment) (back) - Pensions (assessment) (leg) - Chronic pain - Medical report
(consistent diagnosis) (acceptance of prior opinion) - Consequences of injury (iatrogenic illness)(treatment).*

A sewing machine operator suffered a back injury when she bent over in August 1983. In August 1985 she was awarded a 20% pension, later increased to 30%. The worker appealed a decision of the Hearings Officer denying a further increase in the pension.

The worker suffered from severe disabling pain in her low back and left leg. The accident in August 1983 was of a minor nature but resulted in a serious condition requiring three surgical procedures i.e. (decompression laminectomy, discotomy and discectomy) in December 1983. The surgery was not a success. During further surgery in September 1984, the worker's L5 nerve root was severed. The Panel found that the worker had a major organic disability resulting from the accident and medical treatment.

There was considerable medical evidence of a psychogenic component to the worker's pain. However, a close look at the medical reports showed that the reports of psychogenic pain were based on acceptance of prior reports. The doctors were relying on "consensual facts" which emerged from opinions of different doctors reporting over a period of time. The reports of functional overlay related back to a report in March 1985 that the worker was having marital problems that affected her psychological outlook significantly. The Panel could not accept that the worker's prolonged symptoms resulted from functional overlay. In fact, the marital problems resulted from prolonged symptoms. The worker's pain was not psychogenic. Rather, it was real and caused by the organic problem.

The worker was receiving a 30% pension for back disability, the maximum in the Rating Schedule for a completely immobile back. However, the worker's disability was enhanced by the pain she experienced. She could not do housework and needed assistance to wash and bathe. This additional disability may be attributed to severance of the nerve root at L5, for which the worker was entitled to an additional 10% pension.

The worker was also entitled to an additional 10% pension for leg disability. The leg was not only painful but gave way. There were no reflexes in her leg and ankle. The leg was wasted by more than one inch.

The increases in the pension should be retroactive to September 1984 when the nerve root was severed. The appeal was allowed. [16 pages]

WCAT Decisions Considered: Decision No. 915 (1987), 7 W.C.A.T.R. 1 reld to

DECISION NO. 785/90R (14/03/91) Stewart B. Cook Ronson***Reconsideration.***

An application by the worker to reconsider Decision No. 785/90 was denied. There was not sufficient reason to warrant reopening the decision-making process. [3 pages]

WCAT Decisions Considered: 785/90 consid

DECISION NO. 798/90L (14/03/91) Kenny Higson Preston

Leave to appeal (substantial new evidence) (medical report) - Leave to appeal (substantial new evidence) (availability at time of Appeal Board hearing).

The worker, then aged 27, suffered a left shoulder injury in March 1978. He began to experience right shoulder pain, and within several months of the accident, back pain. He continued to work until May 1978, but has not worked since. The Appeal Board found that there was no relationship between the accident and the subsequent disability since the medical evidence identified the back disability as degenerative disc disease aggravated by bad posture.

The worker was granted leave to appeal the Appeal Board's decision on the grounds that a November 1988 medical report constituted substantial new evidence. The 1988 report was made by an orthopaedic surgeon qualified to give an opinion due to his professional status and his personal contact with the worker. The 1988 report provided a new diagnosis of ankylosing spondylitis. The report did not state that the work injury caused the ankylosing spondylitis, but that the work injury aggravated the worker's preexisting ankylosing spondylitis.

Although the diagnosis of ankylosing spondylitis was entertained as a possible diagnosis in several medical reports obtained before the Appeal Board hearing, the doctors had concluded that the worker did not in fact suffer from it. The Appeal Board therefore did not consider ankylosing spondylitis in deciding whether there was a causal link between the injury and the subsequent disability. In this case, the new diagnosis appeared to be the basis for the doctor's opinion on causation. It provided a new medical theory to be considered in deciding the causation question. The diagnosis was not available at the time of the Appeal Board hearing as ankylosing spondylitis is difficult to diagnose in its early stages. [5 pages]

DECISION NO. 143/91 (14/03/91) McCombie Lebert Meslin

Disablement (strenuous work).

The worker appealed a decision of the Hearings Officer denying entitlement for a right arm/shoulder condition. The worker submitted that her condition was a disablement from the nature of her work on either of two days. The Panel found that the worker's work on those days was not strenuous. Medical reports did not relate the worker's condition to her work. The appeal was dismissed. [6 pages]

Board Directives and Guidelines: Claims Adjudication Branch Procedures Manual, Document no. 33-01-02

DECISION NO. 876/89A (15/03/91) Faubert Jackson Nipshagen

Medical examination (section 21) (failure to attend) - Contempt - Adjournment (addition of representative) - Reconsideration - Procedure (reconsideration) (application at hearing) - Medical examination (section 21) (provision of report to worker).

In May 1990, the Panel issued an order requiring the worker to attend a medical examination under s. 21.

At the end of May, the employer advised the worker that an appointment had been arranged for July 17. At the beginning of July, the worker retained a new representative. There was correspondence between the representatives of the worker and the employer regarding a postponement of the examination. The worker did not attend the examination. The employer applied for further relief pursuant to s. 21(2).

The worker's representative asked for an adjournment of the hearing. This request was refused. The representative had ample time to prepare for the hearing.

The worker's representative then requested reconsideration of the original decision requiring the worker to attend the examination. Although Practice Direction No. 8 provides for a written request for reconsideration, the Panel found that an oral request, as in this case, was not barred. However, the Panel found no grounds to reconsider.

The employer suggested a number of possible remedies, including: a criminal complaint under s. 127(1) of the Criminal Code; finding the worker in contempt; barring payment of further benefits to the worker; repayment of the employer's expenses of this application; transfer of the employer's costs to the Administrative Fund.

Based on the correspondence, the Panel found that there was confusion as to whether the parties had agreed to postpone the examination. In these circumstances, the Panel was not satisfied that there was a wilful refusal to comply with the Tribunal's order.

The Panel confirmed its previous order and directed the worker to attend a second examination that had been arranged by the employer. The Panel was informed after the hearing that the worker did attend this examination.

A further dispute arose when the employer refused to give a copy of the report to the worker. The Panel would reconvene to determine whether the Tribunal has authority to require the employer to provide the worker with a copy of the report. [11 pages]

WCAT Decisions Considered: Decision No. 95R (1989), 11 W.C.A.T.R. 1 *reld to*; Decisions No. 72R *reld to*, 72R2 *reld to*
Practice Directions Considered: Practice Direction No. 8 (1987), 1 W.C.A.T.R. 233
Other Statutes Considered: Criminal Code, R.S.C. 1985 c. C-34, s. 127(1)

DECISION NO: 30/91 (15/03/91) Bigras Robillard Seguin

Hearing loss - Board Directives and Guidelines (hearing loss) - Benefit of the doubt.

The worker appealed a decision denying him a pension for hearing loss. The worker met the requirement of five years' exposure to hazardous levels of industrial noise. However, Board policy also requires a hearing loss of at least 35 decibels in one ear and at least 25 decibels in the other.

Tests conducted in December 1980 showed a 32.5 decibel loss in one ear (rounded out at 35) and a 35 decibel loss in the other. The Board denied the pension on the basis of an October 1981 test which found hearing loss of 31 decibels in each ear. The variance between the two tests was minor, but was of crucial importance to the worker's pension entitlement. This variance was the only instance in the worker's medical history showing a decrease in the course of the deterioration of the of his hearing loss. All other tests, from 1976 to 1985, showed a steady deterioration from 30 to 40 decibels, bilaterally.

Faced with equal evidence, the 1980 test which showed a pensionable level of loss and the 1981 test which showed a loss slightly below the required level, and considering that the margin of error is greater

than the difference between the two tests, the benefit of the doubt must resolve the case in favour of the worker. The worker was entitled to a pension for a 35 decibel bilateral loss as shown in the December 1980 test. [9 pages]

WCAT Decisions Considered: 55/87 ref'd to

Board Directives and Guidelines: Operational Policy Manual, Document no. 04-03-06

DECISION NO. 45/91L (15/03/91) Robeson Robillard Barbeau

Leave to appeal (good reason to doubt correctness) (consideration of evidence) - Leave to appeal (good reason to doubt correctness) (consideration of issue).

The worker suffered a fracture of the left patella during a compensable accident in July 1974. In December 1974 idiopathic avascular necrosis of the head of the right femur was diagnosed and a hip replacement was required in June 1975. The worker sought leave to appeal a decision of the Appeal Board denying entitlement for the right hip condition.

The Appeal Board seemed to accept as a fact that the worker did not use crutches after the accident, even though there was evidence before it that the worker did use crutches. It is possible, in view of that finding, that the Appeal Board did not adequately consider the possible effect on the worker's right hip of using crutches. Further, the issue of whether the worker's right hip was injured during the accident, along with the knee, was never considered by the Appeal Board. There was new medical evidence addressing both the concern about the effect of the use of crutches and about the possibility of the hip being injured during the accident. For these reasons, there was good reason to doubt the correctness of the Appeal Board decision. Leave to appeal was granted. [5 pages]

DECISION NO. 906/89 (19/03/91) Kenny Robillard Apsey

Temporary disability (beyond pension level) - Benefit of the doubt - Aggravation (compensable injury) (psychotraumatic disability).

The worker suffered an ankle injury in 1978 for which he was awarded a 10% pension for organic disability and a 10% pension for psychotraumatic disability. He returned to work in December 1982 but had a number of recurrences. The worker appealed a decision of the Appeals Adjudicator denying temporary benefits subsequent to November 1983.

On the evidence, there was not a new accident in November 1983. Further, there was considerable evidence that the worker's disability did not get worse in November 1983. There was evidence that the worker was physically capable of performing the job he was doing in October 1983. There was evidence of similarity of the worker's complaints before and after November 1983. However, there was evidence indicating that the worker's psychological disability worsened as he worked. Although physically capable of performing the job, his perception of the demands of the job may well have aggravated his psychotraumatic disability.

Applying the benefit of the doubt, the Panel found that the work aggravated the worker's psychotraumatic disability. The worker was entitled to temporary benefits until December 1983 by which time he was no longer disabled beyond his pension level. [17 pages]

DECISION NO. 228/90 (19/03/91) Strachan Robillard Jewell

Worker (contract of service) (employment relationship) - Farming.

The worker appealed a decision of the Hearings Officer denying entitlement for an arm injury suffered while riding on a potato digger. The issue was whether the worker was a worker within the meaning of the Act.

A farmer hired help on a very casual basis when required. Those persons who were hired were supplying labour under an implied contract of service and were workers within the Act. There was conflicting evidence as to whether the appellant worker was hired or whether she had merely accompanied her sister. The Panel found that she was hired. The appeal was allowed. [7 pages]

**DECISION NO. 711/90 (19/03/91) Strachan Drennan Jago
Bennici et al. v. Sokolow et al.**

In the course of employment (takes self out of employment) - In the course of employment (reasonably incidental activity test).

The defendant workers appropriated a can, containing methanol, that belonged to the company. During a work break, the workers mixed some of the methanol with a soft drink and offered it to the plaintiff, a company foreman, telling him that it contained vodka. Some or all of the workers drank from the mixture again during a subsequent lunch break. As a result of drinking the mixture, the plaintiff suffered irreversible eye damage which left him legally blind.

Company rules prohibited both theft of property and the consumption or possession of alcohol while on duty. The workers were aware of these rules and that their breach could lead to dismissal.

When stealing and consuming the company's property, the defendants were acting purely for their own self-gratification, contrary to known company policy. Their decision to create a chemical cocktail and to serve it to the plaintiff under the guise that it was vodka amounted to an irresponsible act which was not part of their normal employment activity and was not reasonably incidental thereto.

Since the defendants were not in the course of employment, the plaintiff's right to sue had not been taken away by the provisions of the Act. [7 pages]

WCAT Decisions Considered: Decision No. 234/87 (1989), 10 W.C.A.T.R. 64 reld to; Decision No. 101/90 reld to

DECISION NO. 884/90 (19/03/91) Bigras B. Cook Nipshagen

Board Directives and Guidelines (SIEF) (severity of preexisting-condition) - Accident (occurrence) - Delay (treatment).

The employer appealed a decision finding that the worker sustained a shoulder injury in 1984. The worker had a history of shoulder problems and had sustained a shoulder injury in 1983 while working with a prior employer.

The Panel was satisfied that the incident which the worker claimed had caused a flare-up of his shoulder problems on October 4, 1984 did in fact occur and caused the subsequent disability. The fact that the doctor's report was dated October 6, rather than October 4 (the date on which the worker stated that he saw the doctor), was of little consequence. October 6 was a Sunday, an unlikely date for a visit to a doctor. In any event, the doctor was seen within a reasonable period of time.

The Panel was concerned about the employer's predicament as circumstances went beyond the expected consequences of the work injury. The worker received full benefits for extensive periods between October 1984 and July 1989. The Board had awarded the employer 50% SIEF relief (the same relief that had been allowed the prior employer following the 1983 accident). The Board considered the preexisting condition to be the minor 1983 work accident. The Panel found that the worker had a more significant predisposition which had been evident since the worker suffered an electric shock in 1981. The shoulder had been vulnerable to injury since that time.

As the worker had an unusually prolonged condition resulting from a relatively minor incident (the October 1984 accident) and a pre-existing condition of major significance, the employer was entitled to 100% SIEF relief. [7 pages]

Board Directives and Guidelines: Board Minute No. 3, p. 4845, April 8, 1980

DECISION NO. 99/91 (19/03/91) McIntosh-Janis Robillard Jago

Psychotraumatic disability - Post-traumatic stress disorder - Subsequent incidents (outside work) - Police.

The worker was a police officer. On August 10, 1984, the worker and his partner were called to a hospital where a prisoner was being treated. A scuffle broke out during which the prisoner grabbed the worker's gun. The worker's staff sergeant, who was also there to assist the other officers, was shot in the leg. The worker suffered a back injury during the scuffle for which he was awarded a 5% pension.

On September 3, 1984, the worker came to the same hospital's emergency room to have his son's chin sutured. The worker claimed that, while waiting, his back pain increased and that he had flashbacks to the shooting incident. He fainted and fell to the floor. He suffered a fractured skull, with loss of smell, organic mental impairment and a personality change, for which he was awarded a 20% pension. The employer appealed the decision of the Hearings Officer granting entitlement for the fainting incident.

The worker had been a police officer for over 20 years. He had dealt with all kinds of violent crime. However, prior to September 1984, he had never fainted when exposed to such situations. Prior to August

1984, he had never been involved in a shooting incident. The worker's partner and the staff sergeant also had never fired their guns in the line of duty. They testified about the psychological effects the shooting incident had on them.

There were conflicting medical reports as to whether the fainting incident was related to watching his son's chin being sutured or to increased back pain and flashbacks to the shooting incident. The Panel found that the reports linking the fainting incident to the suturing of his son's chin were not based on a full understanding of the facts. The Panel found that the fainting incident was caused by post-traumatic stress disorder, the criteria for which were experiencing an event that is outside the range of usual human experience and that would be markedly distressing for almost anyone and recurrent recollections, dreams or flashbacks.

On the preponderance of evidence, the Panel found that the fainting incident was causally related to the shooting incident. The appeal was dismissed. [15 pages]

DECISION NO. 107/91 (19/03/91) McIntosh-Janis Klym Chapman

Pensions (assessment) (knee).

The worker suffered a knee injury in 1961 for which he was awarded a 5% pension, increased to 8% in 1988. He also suffered a low back injury in 1964 for which he was awarded a 15% pension. The worker appealed a decision of the Hearings Officer denying an increase in the pensions.

The worker submitted that the increase in the pension for the knee was not sufficient considering medical reports that the knee may deteriorate in the future. The Panel stated that future deterioration may support a claim for reassessment in the future but found that there was no reason to question the correctness of the assessment at this time. On the evidence, the Panel also confirmed the pension for the low back. The appeal was dismissed. [4 pages]

WCAT Decisions Considered: Decision No. 915 (1987), 7 W.C.A.T.R. 1 reld to

**DECISION NO. 187/90 (21/03/91) Strachan McCombie Ronson
Witterdyk v. Signorello**

Section 15 application - In the course of employment (distinct departure test).

The defendants in a civil case applied to determine whether the plaintiff's right of action was taken away. The plaintiff left his home and drove his wife to work. He was then driving towards his company premises when he was involved in a motor vehicle accident.

The defendants submitted that the plaintiff's home also served as an office and that, therefore, the accident occurred while the plaintiff was proceeding from one office to another. Even if this were the case, the Panel found that the plaintiff was not in the course of employment. The company offices were about one mile from the plaintiff's home. He drove a distance of about eight miles to take his wife to work. This was a substantial deviation from any employment activity. This deviation would not cease until the plaintiff was

within reasonable proximity of the point of departure.

The plaintiff's right of action was not taken away. [9 pages]

WCAT Decisions Considered: 169 consd

DECISION NO. 83/91 (21/03/91) Sandomirsky Robillard Jago

Accident (occurrence) - Credibility (delay) - Delay (reporting injury).

The worker claimed to have injured her elbow at work by bumping it on the corner of a wooden table.

The Panel found that the worker did not suffer an unwitnessed accident at work on May 2, 1986. She first received medical treatment, which only resulted in a negative x-ray report, on May 8. The worker did not stop working until May 13 and did not report the accident to her employer until her return to work on May 26. The worker had spoken to the employer, by telephone, before May 26 and told him she was not at work because she was sick.

One specialist concluded that the worker had developed a pain dysfunction syndrome and diagnosed reflex sympathetic dystrophy. He stated that it was not uncommon for such symptoms to follow relatively trivial traumas. Though this suggested a relationship between an accident and the symptoms that the worker had developed, that conclusion was based on a finding that there was in fact an accident. The Panel found that a work accident had not occurred. [6 pages]

WCAT Decisions Considered: 307/90 consd

Cases Considered: Faryna v. Chorny [1952] 2 D.L.R. 354 (B.C.C.A.) consd; Phillips v. Ford Motor Co. of Canada (1971), 18 D.L.R. (3d) 641, [1971] 2 O.R. 637 (Ont. C.A.) consd

DECISION NO. 93/91 (21/03/91) Sandomirsky Robillard Jago

Continuity (of treatment) - Consequences of injury (altered gait).

The worker suffered a right knee injury in December 1969 and received benefits until September 1970. He suffered a left knee injury in February 1981 for which he was awarded a 5% pension. The worker appealed a decision of the Appeals Adjudicator denying further benefits for the right knee.

Considering lack of treatment of the right knee from 1970 to 1980, ongoing work that required significant walking and pole climbing and more significant medical findings regarding the left knee, the Panel found that the current right knee problems were not related to the compensable injuries. The appeal was dismissed. [6 pages]

DECISION NO. 160/91 (21/03/91) McCombie Klym Nipshagen*Accident (occurrence).*

The worker appealed a decision of the Hearings Officer denying entitlement for a back injury. The worker did not lose time from work immediately. There was some seemingly conflicting evidence from a co-worker. However, a close examination of the co-worker's evidence showed that it could be reconciled with the evidence of the worker. It was also understandable that three months later, while seeking treatment at a hospital, the worker could not remember the exact date of the accident. The appeal was allowed. [6 pages]

DECISION NO. 460/89 (22/03/91) Strachan Fox Jewell*Psychotraumatic disability.*

The worker suffered a low back injury in 1971. He received a 10% pension for organic disability, increased a number of times up to 25%. In March 1972, he was awarded a 15% provisional psychiatric pension. However, in June 1972, his pension was reduced to the level of the organic award only. The worker appealed a decision of the Hearings Officer denying entitlement for non-organic disability.

On the evidence, the Panel found that there was a non-organic component to the worker's disability arising shortly after the accident. The non-organic component diminished in effect by the end of 1972. In 1987, there was a change in his psychiatric condition and one psychiatrist classified the worker's impairment in Category 2 of the Board's Rating Schedule for psychotraumatic disability.

A complicating factor in this case was reports of exaggeration. The Panel found that the worker was entitled to benefits for a non-organic disability from 1987. The matter was referred back to the Board for assessment on a whole person basis. [8 pages]

DECISION NO. 871/89 (22/03/91) Strachan Heard Jago*Tinnitus - Medical opinion (tinnitus) - Pensions (assessment) (tinnitus).*

The worker suffered from tinnitus for which he was awarded a 1% pension. The worker appealed a decision of the Hearings Officer denying an increase in the pension.

The worker testified that his life is constantly aggravated by his tinnitus. His testimony described his reluctance to go outside where car motors and wind cause increased symptoms, his inability to sleep through the night, his fatigue, his sense of frustration and a limited ability to cope with everyday noises.

Medical opinion indicated that the effect of tinnitus on individuals is extremely subjective. Former Board policy established 2% as the maximum award for tinnitus except under unusual circumstances. The Panel was of the opinion that the Board intended to incorporate a certain flexibility in the policy to take into account the extremely subjective nature of tinnitus. New Board policy no longer contains the exception for unusual circumstances. The Panel agreed with previous Tribunal decisions that the new policy unduly limited the exercise of adjudicative functions of the Board. The Panel compared the worker's condition to the Rating

Schedule for psychotraumatic disability and found that the worker was entitled to a 10% pension for tinnitus. The appeal was allowed. [12 pages]

WCAT Decisions Considered: Decision No. 876/88 (1990), 13 W.C.A.T.R. 89 apd; Decision No. 36/89 apd
Board Directives and Guidelines: Claims Services Division Manual, s. 71(3), p. 209, Directive 23; s. 122, p.270, Directive 19; Operational Policy Manual, Document no. 04-03-07

DECISION NO. 879/89 (22/03/91) McIntosh-Janis Jackson Preston

Procedure (communication with doctor) - Evidence (admissibility) (improperly obtained evidence) - Evidence (relevance) - Aggravation (preexisting condition) (temporomandibular joint dysfunction) - Temporomandibular joint dysfunction.

The employer accepted that an August 1985 work accident entitled the worker to benefits until September 1985 for a temporary hearing disability, but disputed the payment of further benefits until November 1985 for temporal mandibular joint syndrome (TMJ).

On a preliminary matter, the Panel admitted into evidence a letter from the employer's representative to the worker's dentist, dated October 1988, and the dentist's response dated November 1988.

In April 1986 the worker's representative requested that the dentist answer certain questions, but without giving the dentist a clear history of the case. In June 1988 the employer's representative raised concerns with Tribunal counsel about the facts underlying the dentist's opinion. By letter dated September 1988 the worker objected to Tribunal counsel sending the dentist a letter written by the employer's representative. The employer's representative then sent the letter in issue directly to the doctor and received the response in issue.

Whether the dentist's provision of the response constituted unprofessional conduct, under Reg. 447 or 448 to the Health Disciplines Act (Ont.), was a matter to be determined under that statute, and was not an issue before this Panel. The Panel did not consider s. 77(7) of the Workers' Compensation Act relevant to this situation, but even if s. 77(7) had been violated by the employer, that would not necessarily preclude acceptance of the evidence.

The predominant criterion with respect to the question of admissibility of evidence is relevance. Though the Tribunal is concerned with protecting the integrity of its processes, its statutory obligation to decide cases on their real justice and merits, makes arguments about the way evidence is obtained of limited application.

It was improper for the employer's representative to contact the worker's treating doctor in the face of the worker's clear objection. The appropriate course would have been to bring the matter before the Hearing Panel for a ruling.

In this case, there was no evidence that the employer's representative acted as he did for any purpose other than to expedite the hearing process. The letter sent to the dentist by the employer's representative was unbiased, accurate and referred only to relevant facts or considerations. It sought the very information that the Panel would have requested. Had there been bad faith on the part of the employer's representative, or a serious and wilful compromise of the integrity of the Tribunal's process, the Panel might not have accepted the improperly obtained evidence despite its relevance.

In August 1985 the worker was operating an air cylinder which made a loud noise and hit her in the ribs. She was startled and screamed. The worker felt pain in her right ear and suffered an immediate hearing loss.

The Board properly paid the worker benefits from August to November 1985 because of the compensable accident in August 1985. The period from September to November related to the aggravation of an asymptomatic preexisting TMJ problem which was aggravated by the worker's scream. The employer's appeal was dismissed. [13 pages]

WCAT Decisions Considered: Decision No. 209/90 (1990), 14 W.C.A.T.R. 304 consd; Decision Nos. 550/89 consd, 905/89 consd
Other Statutes Considered: Health Disciplines Act, R.S.O. 1980, c. 196, Regs. 447, 448; Provincial Offences Act, R.S.O. 1980, c. 400

DECISION NO. 1042/89 (22/03/91) Carlan B. Cook Howes

Disablement (nature of work).

The worker appealed a decision of the Hearings Officer denying entitlement for a herniated disc in 1983. The worker claimed that her condition was related to low back pain she experienced in November 1978 as a result of her work as a diamond setter.

The evidence did not support a sudden onset of back pain in November 1978. There was no conclusive evidence as to why the worker suffered a disc herniation. There was some general medical literature indicating that posture may affect the mechanics of the spine. However, it did not address whether poor working positions could lead to disc herniation. A probable relationship was not established. The appeal was dismissed. [7 pages]

DECISION NO. 110/91L (22/03/91) Chapnik Shartal Chapman

Leave to appeal (good reason to doubt correctness) (evidence to support Appeal Board conclusion).

The worker applied for leave to appeal a decision of the Appeal Board denying entitlement for tinnitus and loss of balance associated with hearing loss. New medical reports submitted by the worker were not substantially different from reports which were before the Board. There was evidence to support the Appeal Board conclusion that the worker's ear complaints were not caused by employment.

Leave to appeal was denied. [5 pages]

WCAT Decisions Considered: 109 reld to

DECISION NO. 151/91I (22/03/91) Sandomirsky B. Cook Nipshagen

Adjournment (additional medical evidence).

The hearing was adjourned to allow the worker to obtain medical reports from several psychiatrists who had examined the worker. It would be necessary to consider these reports before reaching a conclusion. It made sense to obtain them before the hearing rather than requesting them post-hearing. [3 pages]

DECISION NO. 393/88 (25/03/91) Strachan Jackson Preston*Pensions (arrears) - Continuing entitlement.*

The worker suffered a cervical strain in September 1978 and received temporary benefits until December 1979. In 1984, she was awarded a 10% pension retroactive to June 1982. In February 1980, she suffered a low back injury and neck strain and received temporary benefits until December 1980. The worker appealed the date for pension arrears and the denial of continuing benefits for the low back disability.

There was no logical basis for limiting retroactivity of the pension to June 1982. The medical reports indicated continuing neck disability from the time temporary benefits were terminated in December 1979. The worker was entitled to arrears to that date.

On the evidence, any low back disability resulting from the accident in February 1980 had resolved by December 1980. The worker may have been suffering from a deteriorating low back condition but it was not related to the compensable accident.

The appeal was allowed in part. [10 pages]

**DECISION NO. 890/89 (25/03/91) Strachan Robillard Seguin
Martin v. Seibler***Section 15 application - In the course of employment (proceeding to and from work) -
In the course of employment (employer's premises) - In the course of employment (access roads).*

The defendant in a civil action applied to determine whether the plaintiff's right of action was taken away. The defendant was proceeding to work at the time of a motor vehicle accident. The plaintiff had met a number of co-workers at a coffee shop and was proceeding, in a co-worker's truck, to a job site on the premises of the defendant's employer at the time of the accident.

The accident occurred on a road built on the premises of the defendant's employer. However, the road was used as a public road connecting two other roads. There were standard traffic signals and road markings. There were no signs restricting access. The Panel found that the overwhelming character of the road was that of a public thoroughfare.

The plaintiff was proceeding to work at the time of the accident. There was no significant difference between driving from home and driving from the coffee shop to the job site. The plaintiff was not in the course of employment.

The plaintiff's right of action was not taken away. [10 pages]

DECISION NO. 223/90 (25/03/91) Strachan B. Cook Apsey*Phlebitis - Preexisting condition (varicose veins) - Overpayment.*

The employer appealed a decision of the Hearings Officer granting entitlement for phlebitis in the left leg. The worker struck her shin in February 1984. She continued to work until May 1984, when she sought medical attention for phlebitis. She had preexisting bilateral varicose veins and underwent surgery for this

condition in September 1984.

The Panel found that the worker was not entitled to benefits for phlebitis. A supportive medical report was based on a misunderstanding that the worker received a blow on her calf rather than her shin. There was a gap from the time of the accident until the worker stopped working. She suffered from bilateral leg pain and had varicose veins in both legs.

The appeal was allowed. The Panel directed that the overpayment not be recovered. Since the worker had not worked since 1985 and her husband had died in 1986 and, accordingly, any attempt to recover the overpayment would be fruitless. [5 pages]

DECISION NO. 328/90 (25/03/91) Strachan Robillard Preston

Disablement (repetitive work).

The worker appealed a decision of the Hearings Officer denying entitlement for a low back disability. The worker was an assembly line worker. His work involved repetitive bending and twisting. In the weeks before the worker stopped working, the worker had a new inexperienced partner. When the partner was unable to maintain the required pace, he had to work harder to keep up. The Panel found that the repetitive work combined with the effect of the inexperienced partner aggravated the worker's preexisting disc degeneration.

The appeal was allowed. The worker was entitled to benefits on an aggravation basis. [6 pages]

DECISION NO. 66/91 (25/03/91) Robeson Beattie Apsey

Medical examination (section 21).

The employer applied for an order requiring the worker to attend a medical examination. The employer's compensation goals related to initial and continuing entitlement and SIEF relief. The examination was important to achieving those goals since the reports on file did not address in any detail the questions of level of disability, ability to perform modified work or preexisting conditions. The application was allowed. [6 pages]

WCAT Decisions Considered: 22/87 reld to, 786/88 reld to, 710/89 reld to

DECISION NO. 20/87 (26/03/91) Strachan Beattie Jago

Aggravation (preexisting condition) (spinal stenosis) - Aggravation (preexisting condition) (disc, degeneration) - Disablement (strenuous work) - Benefit of the doubt.

The worker was employed as a bricklayer from 1956 to 1976. He suffered compensable accidents in 1966 and 1968, each of which resulted in back strains and the payment of benefits for four months. He had not worked since 1976.

The worker had an underlying congenital condition, spinal stenosis, and degenerative disc disease. His

symptoms were consistent with an aggravation of this condition due to his heavy work as a bricklayer. However, there was evidence that the worker had developed a psychogenic component to his complaints which in the opinion of one doctor may have been an overriding factor in the protraction of his condition and his inability to function physically. It was not clear whether any such psychogenic component was related to the worker's pain condition or other non-compensable factors.

The worker was entitled to the benefit of the doubt and a conclusion that he suffered an aggravation of a preexisting condition by reason of his heavy work as a bricklayer prior to his disablement in 1976.

The worker was referred back to the Board for a whole person assessment to determine whether the psychogenic component was work-related and any benefits that might be applicable. [7 pages]

WCAT Decisions Considered: Decision No. 20/87L reld to

DECISION NO. 331/89 (26/03/91) Strachan Drennan Meslin

Cancer (lung) - Smoking - Foundry worker - Evidence (epidemiological).

The worker's widow appealed a decision of the Hearings Officer denying dependency benefits for the worker's death from lung cancer. The worker worked in the casting department of a foundry for 17 years. He was exposed to a "veritable soup" of carcinogens, including nickel, lamp black, cadmium, iron oxides and asbestos. He was also a smoker.

Epidemiological evidence cannot prove causation but it may be the best evidence on the existence or non-existence of a link between disease and employment, particularly when the study concentrates on the worker's cohorts in a restricted area, such as the casting department of this particular foundry. The Panel noted that it was unfortunate that the employer in this case refused the cooperation required to conduct a mortality study and that, therefore, a potentially important piece of evidence was eliminated.

The medical evidence indicated that carcinogenesis was likely rather than simply a possibility. The exact impact of each individual agent in carcinogenesis was unknown and the significance of synergism was unknown. On the balance of probabilities, the Panel found that the workplace exposure was a significant contributing factor to the worker's cancer. The appeal was allowed. [12 pages]

WCAT Decisions Considered: Decision No. 94/87 (1989), 11 W.C.A.T.R. 20 consd

Cases Considered: Rothwell v. Raes, 66 O.R. (2d) 449 consd

DECISION NO. 505/90 (26/03/91) Strachan Higson Jago

Hearing loss.

The worker appealed a decision of the Hearings Officer denying entitlement for bilateral hearing loss. The worker suffered a sudden total hearing loss in his left ear. He also suffered a hearing loss in his right ear of about 30 decibels.

There was some evidence that the hearing loss in the left ear was due to vascular thrombosis. The Panel arranged for an assessment and accepted the opinion that the hearing loss in the right ear was noise-induced

and that a comparable amount of hearing loss in the left ear was also work-related but that the difference in hearing loss between the two ears was not work-related. The matter was referred to the Board for determination of benefits. [6 pages]

DECISION NO. 713/90 (26/03/91) Strachan B. Cook Jago

Permanent disability.

The worker suffered compensable back injuries in 1975, 1981 and 1983. The worker appealed a decision of the Hearings Officer denying entitlement to a pension. On the evidence, the Panel found that the worker had a permanent back disability and that his condition had deteriorated since he was assessed by the Board. The appeal was allowed. The Board was directed to reassess the worker for a pension. [7 pages]

DECISION NO. 769/90 (26/03/91) Hartman Fuhrman Meslin

Continuing entitlement.

A sewing machine operator suffered a neck strain in January 1987. In November 1987, she was discharged from HRC to regular employment. However, a note from her doctor in November 1987 stated that she was still unable to work. The worker appealed a decision of the Hearings Officer denying benefits subsequent to November 1987.

The Panel found that the worker suffered cervical myofascial strain with pain symptoms radiating from the neck in the compensable accident. The only opinion that the worker could not return to work in November 1987 was that of the worker's doctor. There was little medical evidence regarding ability to work from December 1987 to September 1988. There was no evidence of a relationship between a diagnosis in September 1988 of rotator cuff tendonitis and the compensable accident. The Panel found that the compensable condition had resolved by November 1987. The appeal was dismissed. [8 pages]

DECISION NO. 831/90 (26/03/91) Starkman Robillard Meslin

Pensions (assessment) (back) - Pensions (arrears).

The worker was assessed in May 1989 for a pension with respect to a back injury. The result of that assessment was the recommendation of a 0% rating.

Following the hearing (held in November 1990) the worker was assessed by a Board doctor, at the request of the Panel. The doctor found lumbar tenderness and restriction in extension and flexion movements. A 10% pension was recommended.

The worker was awarded a 10% pension. As the worker's initial pension examination was held in May 1989, and as he had presumably achieved maximum medical recovery at that time, the 10% award was made retroactive to that date. [6 pages]

DECISION NO. 866/90 (26/03/91) Hartman Fuhrman Jago

Rehabilitation, vocational (considering self totally disabled) - Rehabilitation, vocational (cooperation).

The worker sustained a back injury in September 1984 while working as an electrician. He was discharged from HRC in June 1985 as fit to return to modified work for a six week period and to regular work thereafter.

The worker received temporary total disability until June 1985, at which time his benefits were reduced to temporary partial disability benefits at 50%. The worker sought temporary partial disability benefits at 100% up to December 1985.

It was evident that the worker claimed to be totally disabled and unable to perform any kind of work in the period following his discharge from HRC. It is not incumbent upon the Board to extend rehabilitation services to workers who insist that they are incapable of performing any work. This was not a case where there was a misunderstanding as to what the worker was actually claiming. Rehabilitation services were not offered but were not wanted. The worker only requested assistance from the Board when he sought reimbursement for a real estate course in the fall of 1985. Immediately upon being denied reimbursement, the worker did not wish further services.

The worker's appeal was dismissed. [7 pages]

WCAT Decisions Considered: Decision No. 595/87R (1990), 16 W.C.A.T.R. 1 reld to

**DECISION NO. 958/90 (26/03/91) Faubert McCombie Preston
Misurak v. Normans**

*Section 15 application - In the course of employment (proceeding to and from work) -
In the course of employment (travelling) - In the course of employment (predominant risk test).*

The defendants in a civil action applied to determine whether the plaintiff's right of action was taken away. The plaintiff was the wife of a worker who was killed in a motor vehicle accident. The issue was whether the worker was in the course of employment at the time of the accident.

The worker lived in London. His office was also in London. He was returning home on the highway from Woodstock, where he had attended a meeting at a job site. The Panel found that the worker was required to travel away from the employer's premises for purposes of the employer's business. As such, his travel to and from the job site was considered to be part of the course of his employment, even if he did not intend to return to the office before going home. The risk to which he was exposed arose out of the requirements of his employment.

The worker was in the course of employment. The plaintiff's right of action was taken away. [9 pages]

WCAT Decisions Considered: Decision No. 733/87 (1988), 8 W.C.A.T.R. 183 distd; Decision No. 479/87I apld

Board Directives and Guidelines: Claims Services Division Manual, s. 3(1), p. 50 Directive 22

Cases Considered: Meyer v. Ontario (WCB), (March 25, 1988) (Ont. C.A.) (unrep.) reld to

DECISION NO. 961/90 (26/03/91) Chapnik Ferrari Apsey

Supplements, temporary - Rehabilitation, vocational (cooperation) - Availability for employment (job search).

The worker suffered compensable injuries for which he was awarded a 5% pension for a shoulder disability and a 15% pension for non-organic disability. The worker appealed a decision of the Hearings Officer denying a temporary supplement from May 1985 to May 1987.

There were indications that the worker failed to cooperate with vocational rehabilitation. He missed a number of medical appointments and did not pursue vocational rehabilitation services with the Board. However, there was evidence that the worker consistently attempted to find modified work on his own. It appeared that there were some misunderstandings and unusual circumstances regarding the worker's relations with the Board. The Panel extended the benefit of doubt to the worker as to his sincerity and found that the worker was entitled to the supplement for the period in question. The appeal was allowed. [7 pages]

WCAT Decisions Considered: Decision No. 915 (1987), 7 W.C.A.T.R. 1 *reld to*; Decision No. 466/89 (1989), 11 W.C.A.T.R. 369 *reld to*; Decision No. 902/88 *reld to*

DECISION NO. 52/91 (26/03/91) Faubert McCombie Preston

Available employment (offer from accident employer) - Availability for employment (refusing suitable work).

A construction labourer suffered a severe hand injury in November 1985, when he was 61 years old. In October 1987, he was awarded a 17.2% pension. The worker appealed a decision of the Hearings Officer denying temporary benefits from June 1987 to October 1987 and denying an older worker supplement subsequent to October 1987.

There were discussions between the employer and the Board regarding return of the worker to work. The Panel found that the employer offered suitable modified work to the worker. He had been employed by the employer for 31 years at the time of the accident. The employer was of the view that the worker could be of assistance, given his familiarity with the business. There was some vagueness regarding the nature of the work to be performed. However, the evidence indicated that the employer was willing to accommodate the worker's restrictions and arrive at a satisfactory arrangement.

The worker refused this offer of suitable employment. He preferred to retire. Canada Pension disability benefits and his union pension depended on his continued unemployment. The worker made a choice and decided to retire.

Since the worker refused suitable modified work at no wage loss, he was not entitled to further temporary benefits.

The worker was also not entitled to an older worker supplement. His impairment of earning capacity was significantly greater than usual, he could not return to his pre-accident occupation and it was most unlikely that he could have obtained any employment other than that offered by the employer. However, to be entitled to an older worker supplement, the worker must demonstrate that he cannot work. In this case, the only possible source of employment was made available to the worker.

The appeal was dismissed. [11 pages]

Board Directives and Guidelines: Claims Adjudication Branch Procedures Manual, Document no. 33-20-17

DECISION NO. 59/91 (26/03/91) McGrath Robillard Meslin

Access to worker file, s. 77.

Access to the worker's file was granted to the employer, except for documents which were not used by the Board in making the decision under appeal. The file contained some reports subsequent to the reports which were used by the Board and those reports should be withheld. [4 pages]

DECISION NO. 60/91 (26/03/91) McGrath Robillard Meslin

Access to worker file, s. 77 (harmful information).

The employer appealed a decision denying access to certain medical documents. These documents had been withheld from the worker under s. 77(2) since they contained information which was potentially harmful to the worker.

The documents were relevant to the issue in dispute and should be released to the employer. To avoid inadvertent disclosure to the worker, the Panel directed that copies of the documents be kept only in the custody of the employer's representative. [4 pages]

DECISION NO. 115/91 (26/03/91) Moore Shartal Preston

Jurisdiction, Tribunal (final decision of Board).

The worker suffered a shoulder injury for which he was awarded a pension. He returned to work for a number of years until his employment was terminated in July 1988. In 1989 The Hearings Officer granted a temporary supplement from November 1989. The worker appealed denial of a supplement from July 1988.

The Panel found that there was no final decision of the Board for the period in question. The Hearings Officer made his decision specifically regarding the period subsequent to November 1989. It appeared that the Hearings Officer intended that the Board deal with the period from July 1988.

The matter was returned to the Board. [5 pages]

DECISION NO. 907/89 (27/03/91) Strachan B. Cook Ronson

Pensions (assessment) (whole person concept).

A truck driver suffered compensable head, cervical spine, shoulder and low back injuries in a motor vehicle accident in 1984. He was awarded a 15% pension for chronic pain. The worker appealed a decision of the Hearings Officer denying temporary benefits subsequent to November 1987 and denying an increase in the pension.

The Panel stated that the appeal should be considered on basis of the whole person concept. The Panel decided that the worker should undergo a post-hearing medical examination by a medical assessor. However,

the examination did not take place due to actions of the worker.

The evidence indicated a history of subjective complaints of pain with minimal objective findings. The Panel found that the worker was not suffering from an organic disability subsequent to November 1987. Without the report from the assessor the Panel was unable to determine whether there had been any change in the worker's non-organic disability. The matter was referred back to the Board for reassessment pursuant to the new chronic pain policy. [7 pages]

DECISION NO. 1020/89 (27/03/91) Starkman, Felice Apsey

Continuing entitlement - Lesion (cerebral).

The worker fell down stairs in September 1984 and suffered a cerebral concussion and multiple contusions. The worker appealed a decision of the Hearings Officer denying benefits subsequent to September 1985 for continuing headaches and pain.

Considering the medical evidence, the Panel found that the worker had a cerebral lesion which was attributable to the compensable accident and that the lesion was a significant contributing factor to the ongoing disability. The appeal was allowed. [7 pages]

**DECISION NO. 158/90 (27/03/91) Strachan Robillard Apsey
Brousseau v. Redman**

Section 15 application - Independent operator (vacuum cleaner sales) - Worker (test) (organization test).

The issue in a s. 15 application was whether the plaintiffs were workers or independent operators at the time of a motor vehicle accident. The plaintiffs sold vacuum cleaners under an agreement with the distributor. The plaintiffs were described in the agreement as dealers. The remuneration of the dealers depended on sales. The first vacuum was supplied on consignment but all others were purchased by the dealers as was the other equipment they used. Generally, there was very little control over the dealers. They worked at their own pace, set their own hours, could sell other products as well and were not restricted to any geographic area.

The Panel found that the dealers were independent operators. Their right of action was not taken away. [11 pages]

DECISION NO. 427/90 (27/03/91) Moore Fox Barbeau

Pensions (assessment) (back) - Pensions (assessment) (leg) - Pensions (assessment) (neck) - Pensions (assessment) (preexisting condition) - Aggravation (preexisting condition) (polio) - Apportionment (pensions) - Pensions (assessment) (enhancement factor) - Pensions (assessment) (whole person concept) - Pensions (stacking) - Maximal medical rehabilitation.

The worker fell at work in 1971. She received temporary benefits for low back disability for a number

of periods and a 30% pension. The worker appealed: 1) denial of a higher pension for her back; 2) denial of benefits for a left leg disability; 3) denial of benefits for aggravation of preexisting polio; 4) denial of benefits for a neck disability; 5) denial of an enhancement factor; 6) denial of further temporary benefits.

1) On the evidence, the worker's back disability was organic in nature. She was already receiving a 30% award for her low back disability. The Panel confirmed this award.

2) The worker had back surgery relating to the compensable accident in 1973 and 1975. There were references in the medical reports to a separate but related injury to the worker's left leg, possibly arising out of that surgery. The Panel found that the worker suffered a distinct left leg injury as a result of the accident. Comparing the worker's disability to the Rating Schedule for loss of hip mobility, the Panel awarded a 10% pension.

3) A Board doctor stated that polio involved death of certain nerves and muscles and that, therefore, it could not be aggravated. The Panel noted that preexisting conditions are compensable to the extent that the compensable injury enhances the residual effect of the preexisting condition. This is accomplished by apportionment. In apportioning, consideration must be given to whether the compensable accident enhanced or aggravated not just the physiology of the preexisting condition but also the functional effect of that condition.

Board policy provides that benefits will be paid commensurate with the degree of remaining compensable disability. When comparing pre-accident and post-accident disability, it is important to consider the ability to perform pre-accident employment. This is a reasonable standard since pre-accident employment is what the worker was capable of doing while affected solely by the preexisting condition.

The worker stated that she was never disabled from working by the effects of her polio until the compensable accident. The Panel found that the Board's rating of the worker's preexisting condition at the 15% level was excessive. It appeared to the Panel that the rating was based on looking at the present significant overall disability. If the worker had been rated for the effects of polio prior to the 1971 accident, the rating would have been different. The Panel concluded that the worker would have received a 6% award for loss of dorsiflexion in the right ankle and 1% for shortening of the right leg, for a total of 7%.

The post-accident level of impairment resulting from the combined effect of the non-compensable polio and the compensable accident involved an evaluation of the worker's disability in its entirety. The principal combined effect was further limitation on use of the right leg. The Panel rated this a 5%. That would bring the total disability award for polio to 12% (including the 7% calculated above). Reducing the award by the 7% impairment that preexisted the accident, the Panel found that the worker was entitled to an additional 5% award for deterioration in mobility of her right leg due to the compensable accident.

4) The Panel found that the worker also suffered a neck disability for which she was entitled to a 5% pension.

5) The Panel applied Decision No. 565/89 and found that enhancement factors are an elaboration of the whole person concept. A combination of disabilities may have an impact greater than the sum of individual disability awards. When the additive approach fails to reflect the full extent of the worker's compensable disability as a whole, an enhancement factor is appropriate. In this case, the total of the separate ratings awarded by the Panel was 50%. Comparing this to the Rating Schedule of 60% for a totally immobile spine and 60% for two totally immobile hip joints, the Panel found that the worker was entitled to an additional 10% award to recognize the enhancement effect of her multiple disabilities.

6) The worker's condition was in a state of considerable flux from 1980 to 1984. The Panel found that the worker did not achieve maximal medical rehabilitation until 1984. She was, therefore, entitled to

temporary total disability benefits from 1980 to 1984. The worker's pensions should, therefore, be retroactive to 1984. [22 pages]

WCAT Decisions Considered: Decision No. 915 (1987), 7 W.C.A.T.R. 1 *reld* to; Decision No. 831/88 (1989), 10 W.C.A.T.R. 334 *consd*; Decision No. 831/88F (1990), 16 W.C.A.T.R. 26 *consd*; Decision No. 565/89 (1990), 16 W.C.A.T.R. 121 *apld*
Board Directives and Guidelines: Claims Adjudication Branch Procedures Manual, Document no. 33-02-30;
Determining Maximum Medical Rehabilitation (MMR), Board Minute 3, July 10, 1990, p. 95

DECISION NO. 72/91 (27/03/91) Starkman Beattie Seguin

Stroke.

On May 14, 1986, the worker struck the left side of his head on a drum. Two days later, he suffered a cerebral infarction. The Board granted benefits for head injuries but denied entitlement for the stroke. The worker appealed denial of benefits for the stroke.

There was conflicting medical opinion from competent qualified neurologists as to whether there was a relationship between carotid infarction and head trauma. Considering blurred vision shortly after the accident, the onset of the infarction two days later and the medical opinions, the Panel found, on the balance of probabilities, that the infarction was causally related to the compensable accident. The appeal was allowed. [6 pages]

DECISION NO. 155/91I (27/03/91) McGrath Jackson Apsey

Adjournment (additional medical evidence).

The worker was appealing denial of continuing benefits. A pre-hearing medical report obtained by the Tribunal Counsel Office recommended a psychiatric assessment. The worker agreed to such an assessment but a report could not be obtained before the hearing. The hearing was adjourned to obtain a psychiatric assessment and to obtain material from the Board regarding its investigations or any chronic pain or psychotraumatic disability. [4 pages]

DECISION NO. 168/91 (27/03/91) McGrath Robillard Preston

Jurisdiction, Tribunal (final decision of Board).

The worker was appealing a decision denying continuing entitlement for a left knee injury related to an accident in 1980. There was a prior compensable left knee injury in 1969 which the Board had not considered in relation to this claim. The Panel declined jurisdiction and sent the matter back to the Board. [3 pages]

DECISION NO. 526/89LR (28/03/91) Sperdakos Fox Seguin*Reconsideration.*

The worker's request to reconsider Decision No. 526/89L was denied. [4 pages]

WCAT Decisions Considered: Decision No. 95R (1989), 11 W.C.A.T.R. 1 reld to; Decisions No. 72R reld to, 72R2 reld to, 526/89L consid

DECISION NO. 782/90 (28/03/91) Hartman B. Cook Howes*Temporary total disability.*

The worker suffered a right knee injury in June 1983. In April 1989, he was awarded a 25% pension for the knee disability and a 10% pension for phlebitis. The worker appealed a decision of the Hearings Officer granting only 50% temporary partial disability benefits from May 1988 to April 1989.

On the evidence, the worker was still temporarily totally disabled during this period. The appeal was allowed. [6 pages]

DECISION NO. 813/90 (28/03/91) Faubert B. Cook Preston*Jurisdiction, Tribunal (final decision of Board) - Issue setting - Chronic pain - Pensions (assessment)(leg).*

The worker suffered a left leg injury in 1967. He appealed a decision of the Hearings Officer denying entitlement to a pension. Prior to the hearing, the claim was referred to the Board under Practice Direction No. 9 to consider chronic pain. the Claims Adjudication branch denied entitlement for chronic pain. There was no further appeal on that issue.

The Panel found that it had jurisdiction to consider the worker's pain complaints as a whole, including chronic pain, and that it did not lose jurisdiction because of the administrative decision to send the file back to the Board under Practice Direction No. 9.

The Panel found that the worker suffered from a minor lesion of the posterior tibial nerve of the left foot. The result of this lesion was residual minor loss of sensation and weakness. The worker's pain complaints were not inconsistent with this condition.

The worker was not entitled to benefits for chronic pain. He was entitled to a pension for residual left foot disability. Comparing the worker's condition to the benchmarks in the Rating Schedule, the Panel awarded a 2.5% pension retroactive to the date of the accident. [9 pages]

WCAT Decisions Considered: Decision No. 638/89I (1989), 12 W.C.A.T.R. 221 apld

Practice Directions Considered: Practice Direction No. 9 (1987), 1 W.C.A.T.R. 444

DECISION NO. 135/91 (28/03/91) Newman Ferrari Preston*Suitable employment.*

The worker suffered a left knee injury in February 1986. The worker appealed a decision of the Hearings Officer denying benefits from September 1988 to March 1989. On the evidence, the worker refused suitable light work at no wage loss which could be done either sitting or standing and which was within the worker's medical restrictions. The appeal was dismissed. [5 pages]

DECISION NO. 950/88 (13/03/91) Starkman Fox Sutherland*Rehabilitation, vocational (considering self totally disabled) - Pensions (assessment) (back).*

The worker was injured in November 1984 and experienced ongoing neck and back pain. Based on an assessment carried out in December 1985, the worker was granted a 10% pension for his head and neck region, 10% for his low back and 2% for his finger. He worked at alternate employment from July 1985 to January 1986, when he stopped working because of back and neck pain. The worker received temporary total disability benefits from January 1986 to August 1986 for this recurrence. From August 1986 to February 1987 he received a supplement in addition to his pension. After February 1987, the worker received only his 22% pension.

The issue was what benefits the worker was entitled to after August 1986. He claimed to be totally disabled subsequent to that date.

The Panel found that the worker had reached maximal medical rehabilitation in December 1985, that he was not totally disabled as of August 1986 and that he was not entitled to receive temporary benefits after August 1986 because he was not cooperating in his vocational rehabilitation. However, the Panel accepted the recommendations of a June 1989 Board assessment and awarded the worker a 20% pension for his cervical spine, 10% for his low back and 2% for his finger. The worker was entitled to a pension supplement from August 1986 to February 1987 because he was making some efforts with respect to a physiotherapy program and with respect to the completion of a real estate course, despite his claim of total disability. After February 1987, the worker was not totally disabled and was no longer cooperating with vocational rehabilitation, so that he was only entitled to his pension. [7 pages]

WCAT Decisions Considered: 950/88I reld to

DECISION NO. 808/87R (28/03/91) Kenny Robillard Apsey*Reconsideration.*

The employer's request to reconsider Decision No. 808/87 was denied. [4 pages]

WCAT Decisions Considered: Decision No. 95R (1989), 11 W.C.A.T.R. 1 reld to; Decisions No. 72R reld to, 72R2 reld to, 808/87 consid, 532/89 reld to

DECISION NO. 23/89 (28/03/91) Kenny Heard Meslin

Pensions (assessment) (chronic pain) - Pensions (assessment) (back) - Pensions (Rating Schedule) (chronic pain) - Chronic pain (Rating Schedule) - Supplements, temporary.

The worker fell in November 1981 and sustained a fracture of the T11 vertebra. The worker's doctor initially reported that the worker would be fit to return to his employment as a mechanic in February 1982, but he never returned to work. In 1984 his permanent disability was rated at 10%. That rating was confirmed in 1986 and 1989. Doctors only found restrictions in movement. The worker claimed that he could not sit or stand for prolonged periods and that he had to lie down at least once a day.

The Panel found that the worker's disability was in fact greater than would be expected from the detected pathology. He thus was not only unable to return to the physical activity involved in his auto mechanics job, but he probably could not do even more sedentary work for more than five hours per day.

The worker had "mixed pain", that is pain from organic sources and chronic pain. There was clearly a concrete organic basis for some ongoing restriction of movement. However, the major factor rendering the worker unable to return to full-time work was his inability to do even sedentary work for prolonged periods, which appeared to be largely an aspect of chronic pain.

Since there was a substantial organic pain component, and since the worker's disability primarily related to physical limitations (rather than social or emotional problems) it was appropriate to rate the disability as though it were predominantly organic.

The 10% rating was probably correct for the disability resulting from organic sources, but it did not compensate the worker for the entire pain disability. The 10% rating did not account for the chronic pain which restricted the worker from working a full day. The worker would likely have been granted a 20% pension if the Board had rated the entire pain disability. The Panel also considered the correctness of the 20% rating by comparing it to the ratings which would likely have resulted if the schedules relating to similar disabilities had been considered. The 20% rating was consistent with those ratings.

The worker was denied a supplement from January to September 1985 because he had stated that he could not work more than a few hours without resting. The Board interpreted this as a claim to being more disabled than warranted by the medical evidence. However, the Panel found the worker in fact to be more disabled than thought by the doctors. The restrictions described by the worker were not unreasonable and did not reflect an unwillingness to cooperate with rehabilitation. He was entitled to a temporary supplement. [19 pages]

WCAT Decisions Considered: Decision No. 915 (1987), 7 W.C.A.T.R. 1 reld to; Decision No. 638/891 (1989), 12 W.C.A.T.R. 221 consid Board Directives and Guidelines: Claims Services Division Manual s. 71(3), p. 209, Directive 23; Report on the Changes to the Chronic Pain Disorder Policy, Board Minute 10, October 5, 1990, p. 5398

Cases Considered: Review of Decision No. 915 and 915A (1990), 15 W.C.A.T.R. 245 (WCB Bd. of Directors) reld to

DECISION NO. 511/90 (28/03/91) Newman Jackson Barbeau

Hearing loss - Hearing loss (ear plugs) - Apportionment (industrial disease).

The worker appealed a decision of the Hearings Officer denying entitlement for hearing loss. On the evidence, the Panel found that the worker worked in a noisy environment and that he suffered hearing loss

from exposure to noise at work. The worker worked on a rotating shift schedule and often worked a full shift plus overtime. The Panel noted that such workers can suffer damage beyond the average due to inadequate recovery time between exposures.

Ear plugs were available to the worker. However, there was no evidence as to use and effectiveness. The availability, use and effectiveness of ear plugs did not impact on the Panel's decision.

The Panel noted Decision No. 398/89 which found that the cost of industrial disease claims should be charged to the class rather than the employer. This issue was not before the Panel in this case. However, the Panel suggested that the Board charge the costs of this claim to the class, particularly because of the employer's efforts to supply hearing protection to its workers.

The appeal was allowed. [8 pages]

WCAT Decisions Considered: Decision No. 398/89 (1990), 13 W.C.A.T.R. 195 consd; Decision No. 511/90¹ reld to

DECISION NO. 888/90 (28/03/91) Robeson Lebert Meslin

Health care (glasses) - Board Directives and Guidelines (health care) (glasses) - Office worker (VDT operator).

The worker experienced pain, blurred vision and watering in one eye while working as a (visual display terminal) VDT operator. No time was lost from work. The worker's optometrist prescribed glasses that were specially tinted for computer glare. The Board granted entitlement for eye-strain and the medical attention required for eye-strain, but denied entitlement for reimbursement with respect to the glasses. The Board considered the glasses to be preventive apparel or safety equipment and thus a labour relations matter, rather than something covered by the Act.

The worker required the prescribed glasses as a result of a compensable injury to her eyes caused by the glare from her terminal. The glasses were required for the medical treatment and management of the compensable disability. The glasses alleviated her eye-strain, headaches and blurred vision. They assisted the worker in maintaining her regular employment. The worker was to be reimbursed for the purchase of the glasses. [6 pages]

WCAT Decisions Considered: 792/89 reld to

Board Directives and Guidelines: Claims Adjudication Branch Procedures Manual, Document no. 33-01-06; Health Care Benefits Policy Manual, Document no. 02-02-04

DECISION NO. 953/90 (28/03/91) Moore Klym Preston

Commutation (debt liquidation) - Board Directives and Guidelines (commutation) (rehabilitative measure).

The worker requested the commutation of his pension in order to pay arrears of taxes owed to revenue Canada. The taxes were owed with respect to a misappropriation of funds by the worker which had led to a criminal conviction. The worker was not working in long-term positions because of the threat of garnishment of his wages.

The worker's psychiatrist stated that the worker was under stress due to financial pressure and that it would result in family breakup. In fact the worker and his wife did subsequently separate. A former employer wrote that he would rehire the worker if he were free of the personal problems which had hindered his performance.

The worker was entitled to a commutation as he was experiencing a "financial situation producing a disability" within the meaning of Board policy.

The policy required that the financial problems arise after the compensable accident. In this case, although the actions that ultimately gave rise to the financial situation (the misappropriation) predated the accident, the financial situation itself (the Revenue Canada assessment) arose after the worker's accident.

The commutation would have a long-term rehabilitative purpose in that it would enable the worker to obtain and maintain steady long-term employment. It would not be in his long-term rehabilitative interests to allow the debt which was accruing interest at \$500 monthly to persist, in order to preserve the \$216 monthly pension. [8 pages]

Other Statutes Considered: Bankruptcy Act, R.S.C. 1985, c. B-3, s.178(1)(d)

Board Directives and Guidelines: Guidelines for the Commutation of Pensions, Board Minute 3, March 20, 1989, p. 71

DECISION NO. 154/91 (28/03/91) Bradbury Robillard Seguin

Temporary partial disability (level of benefits).

The worker suffered a compensable injury in August 1986. He appealed a decision of the Hearings Officer granting only 50% temporary partial disability benefits subsequent to September 1986.

The worker was temporarily partially disabled during the period in question. In September 1986, the worker opened his own shop. Although he did not do the physical work himself, he did supervise and manage the shop. The Panel found that the worker was capable of performing this work and that it was suitable. The Panel agreed with the decision of the Hearings Officer. The appeal was dismissed. [5 pages]

DECISION NO. 179/91 (28/03/91) Kenny Lebert Barbeau

Pensions (lump sum) (ten per cent pension) (advantage to worker).

The worker appealed a decision of the Hearings Officer denying commutation of her 8% pension. It had not been shown that payment of the pension in a lump sum would not be to the advantage of the worker within s. 45(4). Previous Tribunal decisions indicated that if there were strong indications that the worker's condition was likely to deteriorate, it may not be to the worker's advantage to commute the pension. In this case, medical evidence from a Board doctor indicated only that it was possible that the worker's condition could deteriorate. The appeal was allowed. [5 pages]

WCAT Decisions Considered: Decision No. 223/89 (1989), 11 W.C.A.T.R. 302 *reld to*; Decisions No. 749/89 *reld to*, 319/90 *reld to*
Board Directives and Guidelines: Commutation of Pensions Policy, Board Minute 4, April 3, 1987, p. 5186

DECISION NO. 185/91I (28/03/91) Kenny Lebert Barbeau*Adjournment (preparation).*

A bricklayer was appealing the earnings basis for calculation of his pension. The Panel noted a number of decisions regarding seasonal work and unemployment insurance benefits and granted an adjournment to allow the worker to consider whether to proceed with the appeal. [4 pages]

WCAT Decisions Considered: Decision No. 948/88 (1990), 16 W.C.A.T.R. 32 *reld to*; Decision No. 303/90 (1990), 15 W.C.A.T.R. 187 *reld to*; Decision No. 362/90 (1990), 15 W.C.A.T.R. 195 *reld to*; Decision No. 752/90 *reld to*

DECISION NO. 187/91I (28/03/91) Newman B. Cook Preston*Adjournment (additional evidence).*

The employer failed to give the required notice that it would be relying on a transcript of evidence taken before the Appeal Board, particularly the evidence of the worker's treating physician.

The hearing was adjourned to allow the worker to consider the evidence and to consider whether or not to require an opportunity to cross question the doctor. A subpoena for the doctor was to issue at the request of either party. [3 pages]

Practice Directions Considered: Practice Direction No. 4 (1989), 8 W.C.A.T.R. 364

DECISION NO. 286/90 (02/04/91) Strachan B. Cook Meslin*Continuing entitlement - Intervening causes.*

The worker suffered a compensable neck strain in August 1980 and received benefits until January 1981. In 1983, she suffered a neck injury in a non-compensable motor vehicle accident. The worker appealed a decision of the Hearings Officer denying further benefits for neck disability in 1986.

On the evidence, the worker had a minor degenerative neck condition prior to the 1980 accident. The condition was aggravated by the 1980 accident and the 1983 motor vehicle accident. There was a residual disability resulting from the 1980 accident. The matter was referred back to the Board for assessment. [7 pages]

DECISION NO. 476/90 (02/04/91) Moore Beattie Preston*Disablement (repetitive work) - Cashier - Carpal tunnel syndrome.*

A cashier stopped work due to arm pain in January 1985. She received benefits for epicondylitis until August 1985. The worker appealed a decision of the Hearings Officer denying entitlement for a wrist disability.

On the evidence, the worker was not suffering from carpal tunnel syndrome. Nerve conduction studies did not support carpal tunnel syndrome. There was evidence of moderate thickening of the carpal ligament but no evidence of nerve compression.

Without making any conclusions as to what was the worker's condition, the Panel found that it was not related to her work as a cashier. Evidence indicated that the condition developed gradually after the worker stopped working and was no longer performing repetitive movements.

The appeal was dismissed. [11 pages]

DECISION NO. 870/90 (02/04/91) McIntosh-Janis B. Cook Seguin

Penalties.

The employer, an organization which employed armed forces veterans and RCMP officers as commissionaires, appealed a penalty assessment with respect to the period from 1985 to 1987. The employer conceded that it fell within the criteria prescribed by the Regulations for levying a penalty assessment, but submitted arguments in support of its request for elimination or suspension of the assessment.

The IAPA had evaluated the employer's safety program as "poor" in 1985. Evaluations in 1987 and 1989 resulted in a "good" rating. However, it was premature to assess the measures taken to improve safety as reducing accidents to the extent that elimination of the penalty assessment was warranted.

In 1989 the employer began a systematic review of its past claims for the purpose of determining whether it was entitled to greater SIEF relief or increased transfers of costs to other employers. This long process was at a preliminary stage and there was as yet no evidence to indicate a reduction in the employer's accident cost deficit. It was unknown, at this time, how many claims would in the employer's own view merit further action, much less whether any claims pursued by the employer would be successful at the Board.

Prior Tribunal decisions had granted relief from penalty assessments where the employer had assumed a risk that other members of the rate group had not and, by so doing, had generally benefited the other members of the rate group. In this case, some of the members of the rate group did most of their work for the government which work was secure and involved low accident rates, while the employer also did work with private firms which involved riskier outside work. There was no benefit to other commissionaires, much less other members of the rate group, due to the employer's acceptance of non-government clients. The employer was not taking on such work on behalf of other commissionaires. The other members of the rate group should not be required to underwrite any costs or risk of costs associated with the employer's business decision to take on such clients.

The appeal was dismissed. [8 pages]

WCAT Decisions Considered: Decision No. 39/90 (1990), 13 W.C.A.T.R. 333 distd; Decision No. 829/88 distd
Board Directives and Guidelines: Additional Assessments Policies and Procedures, Board Minute 6, January 14, 1975, p. 4419
Regulations Considered: Reg. 951, s. 6

DECISION NO. 51/90R (03/04/91) Bigras Robillard Nipshagen

Reconsideration (representation) - Reconsideration (minor amendment).

The worker's request to reconsider Decision No. 51/90 was denied. The Panel found no deficiencies in the process leading to the decision.

The fact that the worker was unrepresented at the original hearing was not reason to reconsider. The hearing panel exercised prudence beyond normal required levels to assure the worker a fair hearing.

Due to a minor misunderstanding in interpreting medical documents, the Panel made a minor amendment to the decision by granting full disability benefits from December 1987 to January 1988, rather than 50% benefits. This minor amendment was not sufficient grounds to doubt the correctness of the decision as a whole. [5 pages]

WCAT Decisions Considered: Decision No. 95R (1989), 11 W.C.A.T.R. 1 reld to; Decision No. 850/87R (1990), 14 W.C.A.T.R. 1 reld to; Decisions No. 72R reld to, 72R2 reld to, 51/90 consid
Practice Directions Considered: Practice Direction No. 8 (1987), 1 W.C.A.T.R. 233

DECISION NO. 377/90 (03/04/91) Hartman B. Cook Meslin

Continuing entitlement - Notice of hearing.

The worker suffered a compensable back injury in March 1985. The worker appealed denial of temporary benefits subsequent to January 1986. The employer appealed granting of temporary benefits from August 1985 to November 1985.

The worker suffered a previous back injury in 1976 while working for a different employer. It was not necessary to give notice to this previous employer. The Panel was considering only temporary benefits flowing from the 1985 accident. Shared responsibility was not an issue since a permanent disability award was not being considered. In addition, the 1985 accident employer was governed by the Government Employees Compensation Act and was outside Schedules 1 and 2 and SIEF.

On the evidence, the worker's condition had not returned to its pre-accident state by August 1985. However, he had recovered by January 1986. The appeals were dismissed. [9 pages]

DECISION NO. 184/91I (03/04/91) McCombie Robillard Apsey

Adjournment (addition of representative).

The hearing was adjourned to allow the worker to obtain a representative. The worker had not fully understood the implications of proceeding unrepresented. [3 pages]

DECISION NO. 188/91L (03/04/91) Kenny Lebert Barbeau

Leave to appeal (good reason to doubt correctness) (consideration of evidence) - Scope of hearing (where leave granted).

The worker applied for leave to appeal a decision of the Appeal Board denying entitlement to benefits in 1953 and 1954 and denying benefits subsequent to 1972.

There was good reason to doubt correctness of the decision to deny entitlement in 1953 and 1954. Central to this issue of entitlement was the issue of whether an accident occurred in 1953. There was some confusion as to whether the Appeal Board found that no accident occurred or that the worker was not disabled. The Appeal Board decided made its decision without giving any explanation for rejecting the evidence of a co-worker and other evidence that an accident occurred.

The Panel would not have granted leave to appeal the decision regarding benefits subsequent to 1972 if there had been no issue regarding initial entitlement. However, the Appeal Board decision regarding initial entitlement may have affected its dealings with the later period.

Leave to appeal was granted with respect to all issues. [6 pages]

DECISION NO. 309/89R (04/04/91) Starkman Jackson Meslin

Reconsideration.

The worker's request to reconsider Decision No. 309/89 was denied. The worker was not entitled to benefits during the periods in question. He was able to perform his regular work during these periods. His pre-accident job was available but he refused to accept it. [5 pages]

WCAT Decisions Considered: 309/89 consid

DECISION NO. 578/89 (04/04/91) Strachan B. Cook Preston

Continuing entitlement - Delay (onset of symptoms) - Benefit of the doubt.

The worker suffered an ankle sprain in May 1984. The worker appealed a decision of the Hearings Officer denying entitlement in 1986 and 1987.

The worker's continuing problems were plantar fasciitis and spurs in the ankle joint. The worker was not entitled to benefits for plantar fasciitis considering delay in onset of symptoms until March 1985. Applying the benefit of doubt, the worker was entitled to benefits for the spurs on the basis of aggravation of a preexisting asymptomatic condition. [9 pages]

DECISION NO. 164/90 (04/04/91) Strachan B. Cook Cabinet

Independent operator (taxi driver) - Worker (test) (organization test).

The employer operated a taxicab business. Some of the drivers rented cabs from the employer and split the receipts with the employer on a 50/50 basis. The employer appealed a decision of the Hearings Officer finding that these drivers were workers rather than independent operators.

The Board decision appeared to be based on the fact that the rental agreements between the employer and the drivers were oral rather than written. The Panel found that this distinction was artificial. Considering the rental agreement, the intention of the parties, absence of control by the employer, flexible hours, government records and variable compensation, the Panel found the drivers were independent operators.

The appeal was allowed. [6 pages]

WCAT Decisions Considered: Decision No. 423/88 (1988), 10 W.C.A.T.R. 216 reld to

Board Directives and Guidelines: Employer Assessment Policies Manual, Document no. 02-01-05; Determination of Worker/Independent Operator Status: Impact of the Organizational Test, Board Minute 8, December 6, 1990, p. 5410

DECISION NO. 762/90 (04/04/91) Starkman Higson Apsey

Industrial disease (silicosis) - Exposure (silica dust) - Silicosis - Sarcoidosis - Presumptions (section 122).

The worker was employed from 1973 to 1983 as a grinder cleaning large stainless steel castings with air-powered chipping hammers and grinders. He developed a chest disability which he first noticed in January 1979 due to shortness of breath. X-rays taken in February 1979 revealed spots on the lung.

The medical reports referred to both sarcoidosis, which would not be compensable, and silicosis. The Panel found that the worker suffered, at least in part, from silicosis. By the combined effect of s. 122(9) of the Act and Schedule 3 of the Regulations, if a worker whose duties involve the process of grinding or polishing metals contracts silicosis, the disease is deemed to be caused by the work, unless the contrary is proved.

In order to rebut this presumption, the evidence must be sufficiently clear and convincing to satisfy the Panel that workplace exposure to silica dust was not a significant contributing factor to the worker's disability. In this case, there was a variety of medical opinion indicating that the worker may be suffering from silicosis or alternatively sarcoidosis and the worker had workplace exposure at levels which could lead to silicosis.

The evidence was not sufficient for the Panel to conclude that the worker was not suffering, at least in part, from silicosis caused by workplace exposure. The worker was entitled to benefits. [7 pages]

DECISION NO. 802/90L (04/04/91) Marafioti Lebert Nipshagen

Leave to appeal (good reason to doubt correctness) (consideration of issue) - Leave to appeal (substantial new evidence) (medical report) (pension assessment).

The worker sought leave to appeal an Appeal Board decision denying him continuing entitlement to benefits for an elbow and shoulder disability. The Appeal Board also directed a pension assessment of the worker. He was awarded a 5% pension for his shoulder, that was subsequently increased to 15%.

The worker had not even attempted a position offered by the accident employer involving duties that were apparently within his medical restrictions. It was not clear to the Panel exactly what the Appeal Board had decided. The Appeal Board seemed to be deciding that the worker was temporarily partially disabled but was not available for suitable employment. However, it could have decided that during the period in question there was a permanent disability rather than a temporary disability and thus no temporary benefits were payable.

If the Appeal Board had decided that the worker was not available for suitable employment, the worker would still have been entitled to temporary partial benefits, but the Appeal Board did not appear to have considered the relevant provisions of the Act. There was thus good reason to doubt the Appeal Board's decision.

The pension assessment conducted at the request of the Appeal Board constituted new evidence of an ongoing partial disability that was not available before the Appeal Board.

Leave to appeal was granted. [5 pages]

DECISION NO. 916/90 (04/04/91) Chapnik Lebert Meslin

Transfer of costs - Apportionment - Negligence.

Driver 1 (an employee of Employer 1) and Driver 2 (an employee of Employer 2) were truck drivers who were involved in an accident. Driver 1's truck skidded, crossed the centre line of the highway and struck Driver 2's truck. Driver 2 was injured. Employer 1, Employer 2 and the municipality which was responsible for maintenance of the highway, were all Schedule 1 employers.

The issue was whether any of the costs of the accident should be transferred to the account of Employer 1 or of the municipality, rather than being charged against Employer 2. Section 8(9) allows for such a transfer where the accident is caused by the negligence of another Schedule 1 employer or its employees.

The Panel found that Driver 1 had not breached any standard of care and was not negligent. The weather conditions at the time of the accident were precarious and there were patches of ice on the road. Driver 1 was an experienced driver who was driving at a slow rate of speed. The truck started to slide after hitting a patch of ice. No charges had been laid by police as a result of the accident.

The municipality had ploughed and sanded the road prior to the accident. There was no neglect or default on the part of the municipality.

As there was no negligence by Employer 1, the municipality or their employees, there was no basis for a transfer of costs to either of these employers. Though Driver 2 did nothing wrong, workers' compensation is a no-fault system and the injured worker's employer is normally charged with the costs of accidents, regardless of fault. [9 pages]

WCAT Decisions Considered: Decision No. 716/87 (1987), 6 W.C.A.T.R. 242 consd; Decision No. 17/8912 (1990), 13 W.C.A.T.R. 118 consd; Decision Nos. 213/88 reld to, 586/89 reld to
Cases Considered: Gould v. Perth (County) (1983) 42 O.R. (2d) 548 (H.C.) distd

DECISION NO. 145/91 (04/04/91) Onen Shartal Barbeau

Continuing entitlement.

The worker suffered a low back injury in July 1956 and received benefits until May 1957. The worker appealed a decision of the Hearings Officer denying further benefits including benefits for back surgery in 1973 and 1978.

The worker continued to suffer from back pain after benefits were terminated in 1957. The preponderance of medical evidence supported a relationship between the compensable accident and the development of the more serious condition in the 1970s. The appeal was allowed. [9 pages]

DECISION NO. 150/91 (04/04/91) Robeson M. Cook Apsey

Access to worker file, s. 77.

Access to the worker's file was granted to the employer. [4 pages]

DECISION NO. 174/91 (04/04/91) Hartman Robillard Apsey

Commutation (debt liquidation).

The worker appealed a decision of the Hearings Officer denying commutation of the worker's pension, valued at about \$80,000. He wanted the commutation for the purpose of debt liquidation.

The worker persuaded the woman in whose house he was boarding to take out a second mortgage of about \$40,000, with the worker named as guarantor, so that the worker could purchase the distribution rights for a novelty item. The worker and the woman considered their relationship to be that of old personal or family friends. The woman was receiving dependency benefits for the death of her husband.

If the woman was unable to pay the mortgage, the mortgagee would look to the worker as guarantor for payment and if he is unable to pay, the woman could lose the home which she and the worker shared. There was evidence that the worker was suffering from stress and anxiety from the financial situation. The Panel was also concerned about the effect on the woman, another pensioner. In the circumstances, the Panel granted a partial commutation to discharge the mortgage. The money should be paid in trust under s. 26(3) to the solicitor who would be handling the discharge. [8 pages]

Board Directives and Guidelines: Operational Policy Manual, Document no. 05-03-08; Guidelines for the Commutation of Pensions, Board Minute 3, March 20, 1989, p. 71

DECISION NO. 178/91 (04/04/91) Onen M. Cook Preston

Withdrawal (of appeal).

The appeal was withdrawn to allow the worker to pursue the issue of chronic pain at the Board. [4 pages]

DECISION NO. 180/91 (04/04/91) McCombie Robillard Apsey

Continuing entitlement (reliance on Board decision).

The worker fell at work in May 1974. He received benefits until July 1974 for a hand and low back condition. There were no further back complaints until December 1974, when the worker was admitted to hospital after falling down some stairs. The next medical reference to back pain was in April 1975.

The worker was admitted to HRC in July 1975 for hand, spine and hip pain. He was referred by HRC doctors to a neurosurgeon with respect to his back problems. Disc surgery was required in November 1978.

The worker had a long history of back problems prior to the work accident. The congenital problem was subject to periodic flare-up and the worker was compensated for the aggravation of this condition caused by the work accident. The effects of that accident had resolved by July 1974. It was the worker's congenital condition and non-compensable accident which resulted in the subsequent back problems.

At the time that HRC referred the worker to the neurosurgeon, the Board considered the worker to have entitlement for his back condition but entitlement was subsequently denied. It could not be expected that the Board's initial decision as to compensability for the ongoing back problems would be binding for all time. In any event, the fact that an HRC doctor refers a worker to an outside specialist for treatment of a non-compensable condition does not imply acceptance of the condition as compensable.

The worker was not entitled to benefits beyond July 1974. [6 pages]

DECISION NO. 275/89 (05/04/91) Moore Robillard Preston

Pensions (assessment) (white finger disease) - Pensions (Rating Schedule) (Taylor/Pelmeare scale) - Pensions (assessment) (enhancement factor).

The worker appealed the level of his 1.5% pension award for white finger disease.

In previous decisions respecting this worker, the Panel had decided that he had permanent white finger disease and that his symptoms would place him at the moderate stage of the Taylor/Pelmeare scale. On that scale, "moderate" meant "occasional attacks affecting distal and middle phalanges of one or more fingers".

The Panel had requested that the Board provide an indication of the ranges for rating permanent disability for each of the five stages of white finger disease appearing in the Taylor/Pelmeare scale. The Panel accepted the benchmark ratings provided by the Board and applied them to this case. The Board's response indicated that for moderate symptoms the appropriate range of disability would be 3% to 4%.

The worker's white finger disease affected both of his hands. As the majority of fingers in each hand was affected, the worker should be rated at the upper end of the moderate range, being 4% for each hand. As both hands were affected by the disability, a multiple factor of 2% should also be added. The worker was thus entitled to a 10% pension for his white finger disease. [5 pages]

WCAT Decisions Considered: 275/891 *reld to*, 275/892 *reld to*

DECISION NO. 959/89 (05/04/91) Starkman B. Cook Apsey

Continuity (of treatment).

The worker suffered a compensable neck and shoulder injury in December 1976 and received benefits until January 1977. He also suffered a number of other compensable and non-compensable accidents in 1980, 1981, 1982, 1984 and 1985. The worker appealed a decision of the Hearings Officer denying continuing entitlement for neck and shoulder pain.

There was a lack of continuity of treatment or complaint for a number of years following the 1976 accident. The worker was for the most part able to continue with heavy work until 1985. The Panel found that the compensable accidents were not a significant contributing factor to the ongoing disabilities. The appeal was dismissed. [7 pages]

DECISION NO. 92/91 (05/04/91) Sandomirsky Robillard Jago

Consequences of injury (residual weakness) - Subsequent incidents (outside work).

The worker suffered a left knee sprain in October 1982. The worker's doctor suspected a torn meniscus and recommended surgery. However, the worker was reluctant to undergo surgery. The doctor authorized physiotherapy and suggested that the worker wear a hinged knee corset. In January 1983, the worker slipped and fell in an icy parking lot and suffered a fractured left knee. The worker appealed a decision of the Hearings Officer denying entitlement for the fracture.

The Panel found that the icy condition of the parking lot was a significant contributing factor to the fall. However, the condition of the worker's knee was also a significant contributing factor: his knee was weakened, he suffered pain, there was instability in the knee and he was wearing the brace.

The appeal was allowed. [5 pages]

WCAT Decisions Considered: 660/87 *distd*

DECISION NO. 122/91I (05/04/91) Onen B. Cook Clarke

Adjournment (referral to Board) (change in fact).

The worker was appealing a 1986 Hearings Officer decision which denied continuation of vocational

rehabilitation services that had been discontinued in 1983. The Board had determined, in 1983, that the worker was not co-operating and that he would not benefit from the services. The worker claimed that he had not received the proper amount of benefits during the period he was attending a training course in 1983 and that this contributed to the discontinuance of training.

Since 1983, the worker had worked at times, had continued to experience knee problems and had suffered a further back injury. His circumstances had thus changed and required a review to determine whether vocational rehabilitation services ought to be offered in 1991. Given the lack of evidence before the Panel relating to the back injury, to the payment records in 1983 and to the change in the worker's circumstances, it would appear to be appropriate for the worker to apply again for vocational rehabilitation services at the Board.

This hearing was adjourned pending the worker's application for further rehabilitation services based on his current circumstances. A decision made by the Tribunal now, based on the circumstances as they existed in 1983, may not be very helpful in determining the worker's current needs. If the Board were to refuse to offer further services on the basis of the 1986 Hearings Officer decision, the worker could continue this appeal before the Tribunal. If the Board reviews the worker's entitlement to rehabilitation services, but denies it for reasons other than those of the Hearings Officer, the worker can appeal that decision through the normal Board process. [5 pages]

DECISION NO. 156/91 (05/04/91) Onen B. Cook Jago

Psychotraumatic disability.

The worker suffered a severe head injury in 1962 in a compensable accident when a ceiling collapsed. The worker received a provisional pension for psychiatric disability until 1986. The worker appealed a decision of the Hearings Officer denying psychiatric benefits subsequent to 1986.

The worker continued to suffer from severe headaches, dizziness, inability to hear in one ear and double vision. The Board terminated benefits in 1986 after a report from a Board doctor that the worker was suffering from psychogenic pain disorder maintained by personality factors. Numerous other doctors who had examined the worker, including Board doctors, were of the opinion that the worker was suffering from a psychiatric condition related to the compensable accident. The Panel was satisfied that the worker was entitled to continuing benefits for his psychiatric disability. The appeal was allowed. [9 pages]

DECISION NO. 967/89A (08/04/91) Faubert Heard Nipshagen

Benefits (payments by employer).

In this Addendum to Decision No. 967/89, the Panel dealt with the issue of the effect of benefits already paid to the worker on the quantum of benefits to be paid pursuant to the decision.

The employer was concerned that it, or its insurer, had already paid benefits to the worker. The Panel found that s. 46 was applicable. Section 46(1) provides that regard shall be had to any payments made by the employer to the worker, in fixing the amount of compensation to be paid. Section 46(2) authorizes the Board to reimburse the employer for benefits already paid to the worker.

The Board had already reimbursed the employer and would further reimburse the employer for any other sums it had paid. The matter was referred back to the Board to determine the worker's entitlement and reimbursement of the employer for advances already paid. [4 pages]

WCAT Decisions Considered: Decision No. 967/89 (1990), 16 W.C.A.T.R. 181 *reld to*

DECISION NO. 43/91 (08/04/91) Sandomirsky B. Cook Chapman

Continuity (of treatment) - Disablement (nature of work).

A courier suffered a back injury in August 1987 and received benefits for 10 days. In 1988, he began work as a rehabilitation counsellor. In 1989, the worker began to experience back problems. The worker appealed a decision of the Hearings Officer denying entitlement for his back condition in 1989.

Considering lack of continuity of treatment, the Panel found that the worker's condition was not related to the accident in 1987. Further, the condition was not a disablement from the nature of his work. Medical evidence was speculative. There was a lack of treatment until some time after the worker stopped work as a rehabilitation counsellor. The appeal was dismissed. [6 pages]

DECISION NO. 78/91 (08/04/91) Moore Rao Meslin

Rehabilitation, vocational (training) - Rehabilitation, medical (training).

The worker suffered a compensable injury in 1978. In 1984, he began a formal training programme sponsored by the Board. Until 1988, he completed most of his courses. In the winter of 1988 and in the 1988/89 academic year, he had to drop out of the programme due to psychological difficulties. However, he managed to complete a substantial number of courses in the summer of 1989. The Board refused to continue sponsoring the worker in September 1989. The worker returned to school without the sponsorship but was unable to complete any courses. The worker appealed a decision of the Hearings Officer refusing to continue sponsorship.

At the time the Board first refused to continue sponsorship, it was of the opinion that the worker's psychiatric condition was not compensable. Since then, it was determined that the condition was compensable.

The worker has overcome significant obstacles and was close to accomplishing the formal training goal developed by the Board. The psychiatric condition and related stress and depression were sequelae of the compensable accident. There was medical evidence that the most effective way of treating these sequelae was to provide the worker with the rehabilitation assistance he was requesting. The Panel found that the training programme was a necessary vocational and medical rehabilitation measure. The Panel was confident that, with the appropriate support, the worker could complete the programme.

The appeal was allowed. The worker was entitled to sponsorship. It was not appropriate for the Panel to direct the Board as to its internal administration of the file. However, the Panel suggested that the file be assigned to the Board's Complex Case Unit for special attention. [8 pages]

WCAT Decisions Considered: 78/91 *reld to*

DECISION NO. 84/91 (08/04/91) Sandomirsky Robillard Jago*Delay (onset of symptoms).*

A construction labourer fell about four feet in July 1986. He did not lose any time from work until October 1986. The worker appealed a decision of the Hearings Officer denying entitlement to benefits for a back disability.

Considering delay in onset of disability and the worker's ability to continue working until October 1986, the Panel found that the worker's back condition was not related to the accident in July 1986. The appeal was dismissed. [8 pages]

DECISION NO. 181/91L (08/04/91) McIntosh-Janis Lebert Barbeau*Withdrawal (of application).*

The worker's application for leave to appeal was withdrawn to allow the worker to pursue the issue of chronic pain at the Board. [3 pages]

Practice Directions Considered: Practice Direction No. 9 (1987), 1 W.C.A.T.R. 444

DECISION NO. 736/90L (09/04/91) Robeson Beattie Meslin*Leave to appeal (good reason to doubt correctness) (consideration of evidence).*

The worker applied for leave to appeal a decision of the Appeal Board denying entitlement for a back injury. There was good reason to doubt correctness of the Appeal Board decision. The Appeal Board appeared to consider only a fall on the street outside the employer's building but did not appear to consider another fall inside the building. Further, the Appeal Board did not state its findings of fact or give reasons for its decision.

Leave to appeal was granted. [4 pages]

DECISION NO. 844/90 (09/04/91) Chapnik Rao Apsey*Commutation (debt liquidation) (home mortgage) - Board Directives and Guidelines (commutation).*

The worker appealed a decision of the Hearings Officer denying commutation of his pension, valued at about \$54,000. The worker wanted the commutation to reduce the mortgage on his home.

The worker was steadily employed. Granting the commutation would reduce his monthly mortgage payments from about \$900 to \$200 and increase his monthly surplus from about \$600 to \$1300. Although the worker's circumstances did not entirely fit within the Board's commutation policy, the Panel was satisfied that

the commutation was in the long term best interests of the worker and that it came within the intent of the Act. The appeal was allowed. [7 pages]

WCAT Decisions Considered: 693 apld, 126/87 reld to

Board Directives and Guidelines: Operational Policy Manual, Document no. 05-03-08; Guidelines for the Commutation of Pensions, Board Minute 3, March 20, 1989, p. 71

DECISION NO. 896/90 (09/04/91) Hartman Beattie Meslin

Continuing entitlement.

The worker suffered a compensable wrist injury in May 1986. The worker appealed a decision of the Hearings Officer denying entitlement subsequent to March 1989.

There were a number of diagnoses advanced by the worker's family doctor. Whatever the diagnosis, on the evidence, the worker was not disabled subsequent to March 1989. The appeal was dismissed. [6 pages]

DECISION NO. 61/91 (09/04/91) Starkman Lebert Jago

Continuing entitlement - Second Injury and Enhancement Fund.

The worker suffered a minor low back strain in June 1984. The employer appealed granting of temporary benefits from May 1985 to August 1987 and granting of a 15% pension.

There was no identifiable cause for the worker's ongoing problem. However, considering the worker's credible testimony and evidence of continuity, the Panel found that the worker was entitled to the temporary benefits and the pension.

There was evidence of a preexisting compensable condition. There was no precisely identifiable cause of the ongoing condition. The disability continued long after the expected term of recovery. The Panel was of the view that the preexisting condition was a significant contributing factor to the prolongation of recovery. The employer was entitled to 90% SIEF relief. [6 pages]

DECISION NO. 1002/89 (10/04/91) Carlan (dissenting) Drennan Ronson

Accident (occurrence) - Evidence (inconsistencies).

The worker appealed a decision of the Hearings Officer denying entitlement for a back injury which the worker claimed he suffered while moving a heavy drum at work in April 1986.

There was a great deal of confusing and contradictory evidence. The majority of the Panel found that an accident did occur. There was evidence of the worker and a co-worker that an injury occurred. There was evidence of the plant manager and lead hand that they knew the worker was unwell around the time of the accident. There was some supportive medical evidence. References in early reports to chest rather than back pain could be explained by language difficulties. The appeal was allowed.

The Vice-Chairman, dissenting, found that the evidence did not support the claim that there was an accident. Due to the contradictory nature of the evidence, the Vice-Chairman relied on the documentary evidence from the time of the accident and found that it was not sufficient to support the claim. [10 pages]

DECISION NO. 63/90 (10/04/91) Starkman McCombie Howes

Continuing entitlement - Chronic pain.

The worker suffered a shoulder injury in August 1982. The worker appealed a decision of the Hearings Officer denying temporary total benefits subsequent to September 1984. Since the hearing, the worker had been awarded a 10% pension for chronic pain.

The Panel found that the worker was entitled to a pension for chronic pain retroactive to March 27, 1986. There was no indication that the Board considered the new Rating Schedule for chronic pain. The matter was referred back to the Board to determine the amount of the pension in accordance with the new schedule. [5 pages]

DECISION NO. 349/90 (11/04/91) Starkman McCombie Jago

Pensions (assessment) (hip) - Temporary partial disability.

The worker fractured his right hip at work in June 1969 and he underwent surgery which placed a plate in the hip. He returned to his regular work in December 1969. In 1974 the plate and related screws were removed. In 1975 and again in 1976, the worker was admitted to HRC complaining of hip pain. The worker's primary complaints were tenderness around the scar area, stiffness in the morning and in certain types of weather, and most importantly that he was unable to stand for long periods of time.

The worker, though continuing to experience pain and symptomatology in his hip, had reached maximal medical recovery by October 1976 and thus was not entitled to temporary benefits after that date. However, he did continue to have a residual disability as a result of the 1969 accident on the basis of post-traumatic arthritis. The worker was entitled to a 10% pension retroactive to November 1976.

The worker dislocated his shoulder while at HRC in May 1975. In August 1975 he had surgery for a non-compensable neck condition. In 1976 he sustained neck and shoulder injuries in a non-compensable motor vehicle accident. Based on the conflicting evidence, it was not possible for the Panel to sort out with certainty the cause of the worker's shoulder disability. However, on a balance of probabilities, the Panel was satisfied that the problems were more likely related to non-compensable factors. This was based on the serious non-compensable neck injury and the absence of medical opinion relating the compensable accident to the shoulder dislocations. [10 pages]

DECISION NO. 763/90 (10/04/91) Chapnik Beattie Meslin*Continuing entitlement.*

The worker suffered compensable low back injuries in January 1967, August 1967 and July 1979. He also suffered a shoulder injury in 1981. The worker appealed a decision of the Hearings Officer denying entitlement for a low back condition in 1986 and 1987.

The worker was suffering from degenerative disc disease. However, the compensable accidents were also a significant contributing factor to the worker's condition in 1986 and 1987. The appeal was allowed. [8 pages]

DECISION NO. 772/90L (10/04/91) Robeson Rao Apsey*Leave to appeal (good reason to doubt correctness) (consideration of issue).*

The worker applied for leave to appeal a decision of the Appeal Board denying continuing entitlement. There was no substantial new evidence or good reason to doubt correctness of the decision.

Leave to appeal was denied. The issue of entitlement on a non-organic or psychological basis was not raised until the Appeal Board hearing and was not dealt with by the Appeal Board. Leave to appeal was not required on this issue. The worker could pursue entitlement on this issue at the Board. [4 pages]

DECISION NO. 142/91 (10/04/91) Starkman B. Cook Nipshagen*Medical examination (section 21) - Procedure (section 21) (access to worker file).*

The worker applied for an order that he not be required to attend a medical examination. The employer previously requested that the worker attend an examination. In Decision No. 1004/89, the Tribunal decided that the worker did not have to attend for that examination since the employer had not applied for access to the worker's file. However, the employer could not have known of Decision No. 1004/89 since it was released after the hearing of this application.

The Panel found that the issues in this case were predominantly a labour relations matter related to suspension of the worker for failure to attend the medical examination. The employer has still not seen the medical reports in the file. The worker was not required to attend the examination. [4 pages]

WCAT Decisions Considered: 1004/89 consid

**DECISION NO. 535/90I (11/04/91) Moore Klym Apsey
472729 Ontario Ltd. v. Greene***Section 15 application - Executive officers.*

The defendant in a civil case applied to determine whether the plaintiff's right of action was taken

away. The issue was whether the plaintiff was an executive officer at the time of the accident in March 1984.

The two registered directors of a company were the plaintiff's son and daughter-in-law. Prior to incorporation, it had been intended to include the plaintiff as a director and executive officer but he was not included because of financial circumstances. However, in practice, the plaintiff was responsible for directing the activities of the company.

The determination of whether a person is an executive officer will usually be governed by objective evidence such as government or corporate documents. In this case, the objective evidence did not directly support the plaintiff as being an executive officer. However, the evidence established that he was omitted from the corporate records because of his financial status but that he was a directing mind of the corporation.

The definition of officer in the Business Corporations Act, 1982, although of limited use in reference to the Workers' Compensation Act, suggested that a person can be an executive officer by virtue of function notwithstanding absence of designation as an officer. Considering that and previous Tribunal decisions, the Panel found that the plaintiff was an executive officer at the time of the accident. His right of action was not taken away. [11 pages]

WCAT Decisions Considered: Decision No. 170/90 (1990), 14 W.C.A.T.R. 282 apld; Decisions No. 479/87 consd, 258/90 consd

Other Statutes Considered: Business Corporations Act, 1982, S.O. 1982 c. 4, s. 1(28)

Cases Considered: Berger v. Willowdale A.M.C. (1983), 41 O.R. (2d) 89 (C.A.) reld to

DECISION NO. 65/91 (11/04/91) Robeson Beattie Apsey

Access to worker file, s. 77.

Access to the worker's file was granted to the employer. [4 pages]

DECISION NO. 138/91 (11/04/91) Chapnik Ferrari Preston

Continuing entitlement.

On May 19, 1987 the worker suffered a lumbar strain when he attempted to change position while kneeling to hold a measuring tape. On June, 3 1987 he returned to his work as a bricklayer, but experienced increased back pain and was unable to continue. He did not return to work again until September 7, 1987, however, he continued to suffer back problems and was only able to work for a few days at a time. He quit work after October 15, 1987 due to his back. The worker's attempt to return to work in the spring of 1988 was unsuccessful due to his sore back. He returned to work in 1989 when he suffered another compensable accident for which he was receiving benefits.

The Panel found that the May 1987 accident was not a significant contributing factor to the worker's back problems subsequent to June 3, 1987. The diagnosis in May 1987 was a lumbar strain with a return to work estimated in 7 to 14 days. The worker did not see his family doctor or seek any medical treatment from June 1987 to September 1987, though he had been seeing the family doctor on a regular basis for a number of years. This indicated that the back strain had resolved during this period. The worker suffered from an

underlying progressive degenerative back problem which was the significant cause of the of his difficulties for the period subsequent to June 3, 1987. The worker was not entitled to benefits during that period. [6 pages]

WCAT Decisions Considered: Decision No. 915 (1987), 7 W.C.A.T.R. 1:refd to

DECISION NO. 307/8912 (12/04/91) Carlan B. Cook Meslin

Natural justice (replacement of panel member) - Procedure (replacement of panel member).

In Decision No. 307/891, the Panel set out some findings of fact regarding the worker's employment and smoking history. The Panel also requested additional information from a s. 86h assessor. By the time this additional material was received, the Worker Member of the Panel had accepted a new position. The Tribunal Chairman determined that, in view of her new position, it would be inappropriate for the Worker Member to continue to sit on the case. The Tribunal Chairman appointed a different Worker Member to sit on the Panel.

The employer objected to this process on a number of grounds. First, the employer submitted that it had been denied natural justice when the panel member was replaced without consulting the employer. Secondly, the employer submitted that the Tribunal Chairman had no specific authority to substitute a panel member while a hearing was in progress. Thirdly, the employer submitted that the new Worker Member would be required to make a decision on the basis of evidence he had not heard.

The Panel did not believe that the principles of natural justice had been breached by failing to obtain the employer's consent. However, even if there was a perception of denial of natural justice, the concern was remedied by this hearing.

The Tribunal's goal of rendering decisions quickly and efficiently would be seriously jeopardized if substitutions could never be made, especially considering the complexity of some cases, the possibility of illness or death of panel members and their appointment for fixed terms. In this case, the Worker Member could not complete hearing the case. In addition, the Vice-Chair may not be available to complete the hearing either. In these circumstances, the Panel recommended that a new panel be appointed.

The Panel did not have to consider the issue of the findings of fact made in the interim decision but was of the view that there was no reason to interfere with those findings. For that decision to be reopened, it would be necessary to establish that there were grounds for reconsideration. [8 pages]

WCAT Decisions Considered: 307/891 consd

DECISION NO. 198/90 (12/04/91) Bigras Felice Meslin

Disablement (repetitive work) - Delay (claim) - Cashier.

A cashier stopped working in April 1984. The worker appealed a decision of the Hearings Officer denying entitlement for a back condition. On the evidence, the Panel found that the worker stopped working due to a preexisting non-compensable leg and foot condition. The back condition did not begin to cause medical concerns until July 1984, three months after the worker stopped working. The worker did not claim

entitlement for the back condition until six months after she stopped working. The evidence did not establish a link between the worker's work and the back condition. The appeal was dismissed. [8 pages]

WCAT Decisions Considered: Decision No. 565 (1987), 4 W.C.A.T.R. 238 consd; Decision No. 775 (1987), 6 W.C.A.T.R. 74 reld to; Decision No. 590 reld to

**DECISION NO. 759/90 (12/04/91) Chapnik Klym Meslin
Hendrick Home Hardware Ltd. v. Pitschner**

Section 15 application (remoteness) (workers of both employers) - In the course of employment (contemporaneity) - In the course of employment (reasonably incidental activity test) - Worker (test) (business reality) - Independent operator (courier).

The defendant in a civil case applied to determine whether the plaintiff's right of action was taken away. The plaintiff was a courier. He slipped and fell on a ramp outside the entrance to a doughnut shop. The defendant was the owner of the property. The issues were whether the plaintiff was a worker, whether he was in the course of employment and whether workers of the defendant were in the course of employment.

Applying a business reality test, the Panel found that the plaintiff was a worker and not an independent operator. A study showed that independent operators in the courier industry provide their own equipment, can associate with many couriers at the same time, can deliver for more than one service at once and make their own provisions for taxes and benefits. In this case, the plaintiff was an integral part of the employer's business and had worked exclusively for the employer for five years.

The plaintiff went to the doughnut shop while waiting for a store, to which he had to make a delivery, to open. While leaving the doughnut shop, he slipped on the ramp. The Panel found that the plaintiff was in the course of employment. His activity at the time of the accident was reasonably incidental to employment.

There were employees of the defendant who were responsible for maintenance of the ramp. A rubber mat covering the ramp had been removed, causing an unsafe condition. There was an employment or labour-related context to the accident.

The Panel was satisfied that workers of the defendant were in the course of employment at the relevant time, which was when the mat was removed. Contemporaneity was not required.

The plaintiff's right of action was taken away. [18 pages]

WCAT Decisions Considered: Decision No. 84 (1986), 3 W.C.A.T.R. 38 apld; Decision No. 86 (1986), 2 W.C.A.T.R. 52 reld to; Decision No. 229 (1986), 2 W.C.A.T.R. 118 apld; Decision No. 965/87 (1988), 8 W.C.A.T.R. 214 consd; Decision No. 490/88 (1988), 9 W.C.A.T.R. 332 reld to; Decision No. 226/89 (1989), 11 W.C.A.T.R. 307 apld; Decision No. 921/89 (1990), 14 W.C.A.T.R. 207 apld; Decisions No. 436 reld to, 174/88 distd, 217/88 reld to, 1036/89 distd, 295/90 reld to

Board Directives and Guidelines: Determination of Worker/Independent Operator Status: Impact of the Organizational Test, Board Minute 8, December 6, 1990, p. 5410

Cases Considered: Decision No. 2 (1973), 2 B.C.W.C.R. 73 reld to; Meyer v. Ontario (WCB) (1983), 15 O.A.C. 202 reld to

DECISION NO. 117/91L (12/04/91) Bigras Beattie Barbeau

Leave to appeal (good reason to doubt correctness) (consideration of issue).

The worker applied for leave to appeal a decision of the Appeal Board denying continuing benefits for a back injury. There was good reason to doubt the correctness of the Appeal Board decision. The Appeal Board did not appear to consider the issue of entitlement on the basis of aggravation of a preexisting back condition.

Leave to appeal was granted. [4 pages]

DECISION NO. 196/91L (12/04/91) McCombie Shartal Chapman

Leave to appeal (good reason to doubt correctness) (evidence to support Appeal Board conclusion).

The worker applied for leave to appeal a decision of the Appeal Board denying a permanent disability award for a back condition.

There was evidence to support the Appeal Board conclusion. Leave to appeal was denied. The Panel noted the Board could still grant a permanent disability award if there is change in the worker's condition. [5 pages]

DECISION NO. 312/90 (15/04/91) Bigras Higson Seguin

Stress - Disablement (stress) - Mental condition - Alcoholism - Drug abuse - Significant contribution (of employment to disability) - Worker (contract of service) (family member) - Worker (test) (business reality) - Independent operator (farming) - Farming - Jurisdiction, Tribunal (final decision of Board) - Access to worker file, s. 77 (harmful information) - Medical examination (Section 86h).

The worker appealed a decision of the Hearings Officer denying entitlement for a psychiatric disability, including alcoholism and drug abuse, which the worker claimed resulted from the stress of his employment.

The worker was operating a dairy farm owned by his father in accordance with an agreement signed in May 1981. In the fall of 1981, the worker had an argument with his father. The worker took a shotgun and fired at his father's car. The worker was charged with a criminal offence, underwent psychiatric treatment and was committed to psychiatric institutions.

In a preliminary matter, the Panel considered whether the worker should be granted access to medical reports which had been withheld pursuant to s. 77(2). The Panel arranged for a psychiatric examination by a s. 86h assessor. The assessor was of the opinion that the reports could be released to the worker since the worker acknowledged all the problems he had at the time the reports were made. On basis of this opinion, the Panel released the reports to the worker.

In a further preliminary matter, the Panel decided that it had jurisdiction to consider whether the worker was a worker within the meaning of the Act. This issue was raised by Tribunal counsel. The Panel found that it had jurisdiction. It was implicit in the rulings of the Board that it had decided that he was a worker within the Act.

Pursuant to an agreement in 1977, the worker took over his father's milk production business. The worker leased the complete farm from his father and had the milk quota. In December 1978, the worker left to operate his own farm. The Panel found that the worker was an independent operator during this time. However, the agreement in May 1981 was quite different. It was after running into serious financial difficulties that the worker returned to the family farm. The father cleared the worker's debts and returned the milk quota to his farm. The worker had very little control over the milk business and, in reality, very little chance of profit or loss. The Panel found that from May 1981, the worker was a worker within the meaning of the Act.

The Panel found that the worker's employment from May 1981 was not a significant contributing factor to his mental breakdown. The worker had problems with his father for most of his life. He wanted to emulate his father but could not meet his father's expectations. This played a role in his attempt to operate the father's farm in 1977 and to operate his own farm in 1978. Depression and alcohol problems were recorded as early as 1978. The pressures of being employed by his father in 1981 were not significant compared with the problems encountered prior to that time.

The appeal was dismissed. [15 pages]

WCAT Decisions Considered: Decision No. 3 (1986), 3 W.C.A.T.R. 1 reld to; Decision No. 915 (1987), 7 W.C.A.T.R. 1 reld to; Decision No. 918 (1988), 9 W.C.A.T.R. 48 reld to; Decision No. 1018/87 (1989), 10 W.C.A.T.R. 82 reld to; Decision No. 99/89 (1989), 11 W.C.A.T.R. 274 reld to; Decision No. 145/89 (1990), 14 W.C.A.T.R. 74 reld to; Decision No. 226/89 (1989), 11 W.C.A.T.R. 307 apld; Decision No. 980/89 (1990), 13 W.C.A.T.R. 304 apld

Cases Considered: *Montreal v. Montreal Locomotive Works Ltd.*, [1948] 1 D.L.R. 161 consd; *Short v. J. & W. Henderson Ltd.* (1946), 62 T.L.R. 427, 115 L.J.P.C. 41 consd; *Stevenson, Jordan and Harrison Ltd. v. MacDonald and Evans Ltd.*, [1952] 1 T.L.R. 101 consd

**DECISION NO. 723/90 (15/04/91) Faubert Drennan Meslin
Kingsway Transports Ltd. v. Paragauskas**

Section 15 application (remoteness) - In the course of employment (contemporaneity).

The defendant in a civil case applied to determine whether the plaintiff's right of action was taken away. The plaintiff slipped on icy steps while entering the defendant's building. There were workers of the defendant who were responsible for maintaining the steps. Those workers did not have to be in the course of employment at the actual time of the accident. The Panel was satisfied that there were workers of both employers in the course of employment at the relevant time.

The plaintiff's right of action was taken away. [6 pages]

WCAT Decisions Considered: Decision No. 84 (1986), 3 W.C.A.T.R. 38 reld to; Decision No. 965/87 (1988), 8 W.C.A.T.R. 214 apld; Decision No. 723/90 reld to

DECISION NO. 158/91I (15/04/91) Faubert Drennan Jago

Adjournment (referral to Board).

The hearing was adjourned. The case was referred to the Board to consider entitlement for non-organic disability. [5 pages]

WCAT Decisions Considered: Decision No. 638/89I (1989), 12 W.C.A.T.R. 221 reld to; Decisions No. 487/89I reld to, 501/89 reld to, 662/89 reld to, 825/89 reld to

DECISION NO. 159/91I (15/04/91) Hartman B. Cook Howes

Adjournment (referral to Board).

The hearing was adjourned. The case was referred to the Board to consider entitlement for chronic pain. [5 pages]

WCAT Decisions Considered: Decision No. 638/89I (1989), 12 W.C.A.T.R. 221 reld to; Decision No. 693/89I(1989), 12 W.C.A.T.R. 236 reld to; Decisions No. 487/89I reld to, 501/89 reld to, 662/89 reld to, 825/89 reld to

DECISION NO. 284/90 (16/04/91) Moore Higson Seguin

Hicks v. Keck

Section 15 application - Schedule 1 employer (for profit or gain) - Class of employer (farming) - Worker (for purposes of employer's industry) - Derivative action.

The defendant in a civil action applied to determine whether the plaintiff's right of action was taken away. The defendant was a dentist. He also owned a cattle farm. The plaintiff was employed by the defendant to assist on the farm. The plaintiff was injured while hanging a door on a shed in which the defendant stored his airplane.

The plaintiff submitted that the defendant was excluded from Schedule 1 by virtue of s. 4(a) of Reg. 951 since the farm was not operated for profit or gain. The plaintiff also submitted that there was a separate operation of the defendant that was personal and not related to the farm and, further, that the plaintiff was not a worker employed for the purposes of the employer's industry within the definition of worker.

The plaintiff's employment included tasks of both a farm worker and a handyman. At the time of the accident, the plaintiff was performing a task related to the non-farming aspects of his job. However, this was not determinative. In s. 1 of Reg. 951, farm is defined to mean "premises the whole or part of which are used for agricultural purposes". This shows an intention to include all the premises of a farm as part of the farm. Therefore, the shed was part of the farm even though it was not used for farming purposes. Further, the plaintiff's handyman activities were incidental to the farming operation. The bulk of his work was for the farm. The Panel concluded that the plaintiff was employed in a farming operation at the time of the accident.

The defendant's operation was not excluded from Schedule 1 by s. 4(a) of the Regulation. Although the farm had never made a significant profit, the defendant's objective was to make as much money as he could in the circumstances.

The plaintiff was a worker in the course of his employment for the defendant, a Schedule 1 employer. His right of action against his employer was taken away by s. 14. Further, the right of action of his family members was also taken away by s. 14. [11 pages]

WCAT Decisions Considered: Decision No. 490/881 (1988), 9 W.C.A.T.R. 332 apld; Decision No. 525 consid
Regulations Considered: Reg. 951, ss. 1, 4(a), Schedule 1 class 27

DECISION NO. 650/90 (16/04/91) Kenny Robillard Apsey

Hearing loss - Benefit of the doubt.

The worker appealed the denial of a pension for hearing loss. The worker, who was born in 1925, stopped working in 1986.

The worker underwent a number of audiograms from 1982 to 1989. Two audiograms performed in 1986, before the worker retired, showed sufficient hearing loss to qualify for a pension.

Two audiograms were performed by one doctor in 1987. The first showed sufficient loss, but the second did not. That doctor provided evidence as to why the second test should be taken as the accurate one. The Board accepted the second of these tests in denying entitlement. The Board also found that subsequent tests, which indicated a sufficient level of loss to qualify for a pension, represented a deterioration associated with aging rather than occupational noise.

The Panel found that the evidence for and against the worker having sufficient hearing loss to qualify for a pension was approximately equal in weight. The evidence did not establish that the 1986 audiograms were distorted by "temporary threshold shift". The worker had been away from industrial noise for more than 24 hours before at least one of the 1986 tests was performed.

Considering that all the audiogram results (including the second 1987 test) showed bilateral loss fairly close to the required levels, that three of these test results exceeded those levels, and considering the difficulty in precisely measuring hearing loss, the Panel applied the benefit of the doubt and found that the worker was entitled to a pension. [10 pages]

DECISION NO. 71/91 (16/04/91) Starkman Beattie Seguin

Continuing entitlement.

The worker fell in 1979 striking her head and left side, including her shoulder and hips. The worker was employed in clerical jobs and continued to work until 1988. However, she testified that, since the fall, she had continuing problems with her lower back and hips which caused her to miss time from work a few times each year.

The Panel found that the worker's back and hip problems were not related to the 1979 accident. The initial reporting to the worker's family doctor indicated that the primary difficulty was with respect to

the worker having struck her head. There did not appear to be any significant problem with her hip or back at that time. There was no continuity of complaint from 1971 to 1981 or 1982. There was no organic basis for the worker's ongoing problems. There was some indication that the problems were resolving themselves. None of the doctors had drawn a causal connection between the 1979 accident and the worker's ongoing problems. [5 pages]

DECISION NO. 90/91 (16/04/91) Stewart Ferrari Nipshagen

Access to worker file, s. 77 (issue in dispute) (relevance) (prior claim files) - Jurisdiction, Tribunal (section 77) - Second Injury and Enhancement Fund.

The employer appealed denial of access to two prior claim files regarding injuries to the worker when he was employed by other employers. The Board's Access Specialist denied access since neither the worker nor the previous employers gave written authorization.

The worker submitted that the Tribunal did not have jurisdiction on this appeal since the Board decision did not address the relevance of particular documents. The Panel found that, pursuant to s. 77(6), it had jurisdiction over all issues that may arise under s.77, including procedure and general interpretation of the section.

The issues in dispute included SIEF relief. The worker submitted that s. 108(2) did not create a proper legal foundation for the existence of the Second Injury and Enhancement Fund and that, therefore, SIEF could not be an issue in dispute. The Panel found that the wording of s. 108(2) was broad enough to include SIEF.

The worker also submitted that s. 77 did not contemplate release of documents from claims other than the claim involving the accident employer who was requesting access. The Panel found that the Legislature did not intend to impose such a restriction. Further, s. 77(1) provides for "full access to and copies of the Board's file and records respecting the claim". Records respecting the claim was a broader category than the Board's file. Section 77(3) grants the employer access to the broader category of the records of the Board.

The Panel concluded that the employer was not precluded from access to relevant information in the previous claim files. The matter was referred back to the Board to determine relevance of these documents. [8 pages]

WCAT Decisions Considered: 516/90 reld to

DECISION NO. 186/91 (16/04/91) McCombie Robillard Apsey

Second Injury and Enhancement Fund (preexisting condition) - Board Directives and Guidelines (SIEF) (preexisting condition).

The employer appealed a decision denying entitlement to SIEF relief. The worker sustained a back injury in August 1980 and he returned to his regular work after a few months. Over the next few years the worker suffered a number of recurrences involving short periods of lost time.

X-rays taken in November 1980 and January 1987 indicated a normal spine. A March 1987 CT scan indicated some degenerative change. The employer submitted a medical report stating the opinion that the

worker had asymptomatic degenerative disc disease at the time of the accident.

In some prior Tribunal decisions where relief was granted, there was evidence of degenerative disc disease (in normal x-rays, as opposed to CT scans) taken from one day to two years after the accident. This suggests an implicit finding that the underlying condition was, if not symptomatic at the time of the accident, then well on its way to becoming symptomatic, with or without the intervention of trauma.

Board policy suggests that it is not enough that a pre-existing susceptibility might have enhanced the severity of the disability. The question of whether such a susceptibility is "normal" in the general population must also be considered. This worker was in the age group where degenerative disc disease is commonly encountered so that he was not more liable to develop a disability of greater severity than a "normal" person of 36 years who would be expected to have some asymptomatic degenerative disc disease. To interpret Board policy otherwise, would be to suggest that all long-term back claims in workers older than 20 to 25 years should result in SIEF relief, as they are more susceptible due to asymptomatic degenerative disc disease.

In this case there was no radiological evidence of degenerative disc disease until the CT scan taken seven years after the accident and, even then, the findings were not dramatic.

Preexisting conditions vary in their tendency to ultimately contribute to a disability of greater severity than would result in a normal person. SIEF was not intended to apply to cases of a worker with an asymptomatic condition that may remain asymptomatic for the worker's entire life if there is no trauma. SIEF is intended to apply in the case of workers who have a progressive condition which could have predictably become symptomatic whether there was an accident or not and the only contribution of the accident was to speed up the process and make it symptomatic and more disabling sooner than it otherwise would have been.

In cases where there is underlying degenerative disc disease, relief should not be given automatically. It must first be determined that: a) the condition contributed to a greater disability than a "normal person" would have suffered and, b) that it prolonged or enhanced the disability resulting from the compensable accident.

The appeal was dismissed. [11 pages]

WCAT Decisions Considered: Decision No. 184 (1986), 3 W.C.A.T.R. 103 reld to; Decision No. 238/89 (1990), 16 W.C.A.T.R. 96 apld; Decision No. 607/90 (1990), 15 W.C.A.T.R. 236 reld to; Decision No. 674/90 (1990), 16 W.C.A.T.R. 299 reld to
Board Directives and Guidelines: Operational Policy Manual, Document no. 08-01-05; Claims Services Division Manual s. 108(2), p. 235, Directive 1

DECISION NO. 189/91 (16/04/91) Newman Shartal Chapman

Pensions (lump sum) (ten per cent pension) (advantage to worker).

The worker appealed a decision of the Hearings Officer denying commutation of the worker's 10% pension. The worker wanted the commutation for the purpose of business investment.

The worker had not given his business plans a great deal of thought. However, he expressed intense motivation and considerable commitment to succeed. The effect of the worker's disability was extremely limited. There was no medical evidence indicating a likelihood that his condition would deteriorate. The monthly pension payment of \$200 was insufficient to guarantee financial security.

It was not shown that it would be to the disadvantage of the worker to pay the pension as a lump sum. The appeal was allowed. The Panel recommended that the worker seek financial advice. [4 pages]

WCAT Decisions Considered: 699/89 reld to, 906/90 reld to

DECISION NO. 202/91 (16/04/91) McCombie B. Cook Preston

Withdrawal (of appeal).

The worker's appeal was withdrawn to allow the worker to pursue other issues at the Board. [3 pages]

DECISION NO. 240/91 (16/04/91) Sandomirsky Lebert Apsey

Access to worker file, s. 77.

Access to the worker's file was granted to the employer. [3 pages]

DECISION NO. 241/91 (16/04/91) Sandomirsky Lebert Apsey

Access to worker file, s. 77.

Access to the worker's file was granted to the employer. [3 pages]

DECISION NO. 206/89 (17/04/91) Signoroni Lebert Jewell

Exposure (beryllium) - Medical opinion (beryllium-related disease) - Beryllium-related disease - Presumptions (section 122) - Benefit of the doubt - Causation (medical evidence) (standard of proof) - Parties (representation) (conflict of interest).

The worker was a lathe operator. He died after launching an appeal from a decision of the Hearings Officer denying entitlement for a condition which he claimed was related to exposure to beryllium. The appeal was continued by his wife.

In a preliminary matter the Panel found that there was no conflict of interest on the part of the firm representing the employer. The principal of that firm had been the Administrator of the Claims Adjudication Section of the Board in the London area. In that capacity, he had received and replied to three memos that were in the Case Description. However, there was no evidence that he had ever talked to the worker or obtained any confidential information which could be used in this appeal.

Beryllium is listed in Schedule 3 of Regulation 951. Therefore, the presumption in s. 122(9) could be applicable. However, the Panel was of the opinion that, before the presumption could apply, it must be established that the disability was caused by the substance in question. In this case, the presumption was

not applicable since the issue was whether the disability was caused by exposure to beryllium.

A medical paper identified seven criteria relevant to establishing a diagnosis of beryllium-related disease: 1) history of exposure; 2) clinical presentation; 3) chest x-ray findings; 4) lung function tests; 5) pathological changes; 6) beryllium content of various body tissues and fluids; 7) immunological tests.

On the evidence, the Panel found that the worker was exposed to beryllium dust approximately 200 hours a year for a period of 13-14 years. The clinical presentation, x-rays, lung function tests and pathological changes were all compatible with beryllium-related disease but were also compatible with a number of other interstitial lung diseases which would not be compensable. Tissue and fluid content and immunological tests were not available.

The Panel noted the distinction between medical and legal causation. Medical causation may require certainty whereas a lesser standard may be required by law. There was substantial evidence both for and against a theory of employment-relatedness in this case. The Panel was satisfied that the evidence for and against was approximately equal in weight. The benefit of doubt was applied in favour of the worker.

The appeal was allowed. The matter was referred back to the Board for determination of benefits. [58 pages]

WCAT Decisions Considered: Decision No. 885/88 (1989), 11 W.C.A.T.R. 163 consd; Decision No. 79/90 (1990), 15 W.C.A.T.R. 144 consd
Regulations Considered: Reg. 951 Schedule 3

Other Statutes Considered: Occupational Health and Safety Act, R.S.O. 1980 c. 321, O.Reg. 654/86

Cases Considered: Snell v. Farrell (1990), 72 D.L.R. (4th) 289 (S.C.C.) consd Appendices: Medical brief concerning Interstitial Lung Disease and Beryllium-related Disease

DECISION NO. 482/89 (17/04/91) Strachan Robillard Apsey

Disablement (repetitive work) - Medical opinion (ganglion).

The employer appealed a decision of the Hearings Officer granting benefits for a ganglion near the base of the worker's little finger. The worker related the ganglion to use of a pistol grip to operate an electric hoist and to manual lifting.

The installation of the electric hoist several months before the appearance of the ganglion reduced the amount of manual lifting required. Limited pressure was required to operate the hoist. The ganglion did not recur even though the worker returned to the same work. A medical opinion supporting entitlement was based on a misunderstanding of the mechanics of the work operation. There were a number of articles suggesting that there was generally no link between employment and development of a ganglion.

The appeal was allowed. [8 pages]

DECISION NO. 954/89 (17/04/91) Onen Beattie Meslin

In the course of employment (distinct departure test) - In the course of employment (personal activity).

The employer appealed a decision granting the worker initial entitlement for a claim arising out of a single vehicle motor vehicle accident.

The worker was a truck driver who went to Pennsylvania on a weekend trip to make a delivery and pick-up from the employer's plant. He was given a cash advance by the employer to cover expenses for an overnight stay at a hotel.

The worker included a considerable amount of personal activity in this business trip. He brought a friend along whose expenses were paid out of the employer's cash advance. He spent the Saturday evening drinking at a bar near the employer's plant and the remainder of the night drinking, chatting and resting outdoors. The worker did not stay at a hotel overnight because he did not have enough money to cover himself and his friend.

The accident occurred after the truck had been loaded on Sunday and the worker was purportedly returning to Ontario. However, the truck was not on the road to Ontario at the time and was only 20 miles away from the plant two hours after departure. The worker had continued drinking on the day of the return trip. He was charged with reckless driving.

At the time of the accident, the worker unquestionably had a connection with his employment as he was driving the employer's truck which had been loaded for a delivery to Ontario. However, in light of the other factors mentioned above, the connection with employment was not sufficiently significant. The test was whether he had made a distinct departure for personal reasons. The Panel found that the worker had engaged in a pattern of personal entertainment interspersed with employment activity during the trip and that the accident occurred during a phase of personal activity.

As there was a distinct departure from the prescribed route and from any significant employment activity, for personal purposes, the accident did not arise out of and in the course of employment. As there was sufficient evidence with respect to the critical facts to find that the accident did not arise out of or in the course of employment, the presumption in s. 3(3) did not assist the worker in this case. [15 pages]

Board Directives and Guidelines: Claims Adjudication Branch Procedures Manual, Document no. 33-14-03

**DECISION NO. 3/90 (17/04/91) Strachan (dissenting) Klym Apsey
Budnikas v. Pengelly**

*In the course of employment (work relatedness test) - In the course of employment (employer's premises) -
In the course of employment (parking lots) - In the course of employment (proceeding to and from work).*

The plaintiff was crossing a laneway so as to pass from one building occupied by his employer to another building occupied by the employer. While in the laneway, he was struck by the vehicle of the defendant, another employee of the same employer. The defendant was leaving work at 11:30 a.m. in order to attend a doctor's appointment. The laneway was located on the employer's premises.

The majority of the Panel found that the plaintiff and the defendant were both in the course of their employment when the accident occurred. The plaintiff's right of action was thus taken away.

The majority stated that the appropriate test was the "work-relatedness test", rather than the "premises test". It concluded that the use of an automobile is an accepted method of commuting to and from work and that arriving at or leaving work is an activity reasonably incidental to employment.

The appointment which the defendant was attending was a lengthy one and he did not intend to return to the employer's premises. Thus, although there was a personal element to the defendant's activity, his departure was equivalent to leaving work at the end of the day -- an activity which is reasonably incidental

to employment. There was thus a significant connection with the employment to keep the worker in the course of his employment.

The Vice-Chairman, dissenting, agreed that the plaintiff was in the course of his employment, but would have found that the defendant was not, and thus would have found that the plaintiff's right of action was not taken away.

It is a basic rule of compensation law that, generally, a worker is not in the course of employment while travelling to and from work. According to this rule commuting to and from work does not meet the work-relatedness test. There is no justification for treating an accident occurring ten feet inside the employer's gate differently from one occurring ten feet outside the gate. In this case the only factor that could bring the defendant into the course of his employment was the fact that the laneway was located on the employer's property. Unless one finds that the general rule about proceeding to and from work is wrong, treating accidents that occur inside the employer's entrance differently than those occurring outside, amounts to an application of the premises test.

The activity of the defendant leaving the employer's premises was an activity performed solely for the worker's benefit and not for the benefit of the employer. There was no control over the activity exerted by the employer. In driving down the lane, the defendant was exposed to risks which were primarily those of the driving public and not risks related to the employment. It was an activity more properly analogous to proceeding to and from work. [11 pages]

WCAT Decisions Considered: Decision No. 547/87 (1988), 8 W.C.A.T.R. 160 reld to; Decision Nos. 690/87, reld to, 674/89 apld

DECISION NO. 500/90 (17/04/91) Signoroni Beattie Barbeau

Hearing loss - Hearing loss (traumatic).

The worker started working in a steel plant in 1966, at the age of 19. A test performed in 1966, before the employment began, showed a minimal high tone hearing loss recorded as 13.7 decibels in the right ear and 16.2 decibels in the left ear.

The Panel found that from 1966 to 1973 the worker was exposed to hazardous noise levels within the Board policy; from 1973 to 1978 he worked in a noisy area but had ear protection; and from 1978 to 1987 he was exposed to noise levels at, or just below, the levels set out in the Board policy. In 1978, a bullet exploded a few feet from the worker's left ear which resulted in pain, ringing ears and a 10 day compensable absence from work.

The worker's hearing loss worsened between 1966 and 1972 and also between 1972 and 1978 when the bullet went off. There had been very little change with respect to the worker's left ear during the last 10 years and the hearing loss had not progressed since the worker stopped working in the noisy area.

On the conflicting medical evidence, the Panel found that the worker's pre-existing minimal hearing loss did not preclude work from being an additional factor to his further hearing loss. All of the doctors, except one, supported a relationship between the worker's hearing loss and his exposure to noise at work. The Panel concluded that the acoustic trauma caused by the exploding bullet likely did not result in any deterioration in left side hearing but it probably affected at least the right ear.

The worker was entitled to benefits. [11 pages]

DECISION NO. 509/90I (17/04/91) Onen Jackson Chapman*Procedure (absent parties).*

The unrepresented worker did not appear for the hearing of his appeal. The hearing was adjourned. [3 pages]

WCAT Decisions Considered: 509/90L reld to

DECISION NO. 751/90R (17/04/91) McIntosh-Janis Lebert Nipshagen*Reconsideration.*

The employer's request to reconsider Decision No. 751/90R was denied. The Panel's findings were based on the evidence and on assessment of the worker's credibility. [3 pages]

WCAT Decisions Considered: 751/90 consd

DECISION NO. 753/90 (17/04/91) Bigras Robillard Sutherland*Continuity (of treatment).*

A welder suffered a hip injury in November 1983 when an air cylinder exploded. He received benefits for periods of time until February 1988. The worker appealed a decision of the Hearings Officer denying further entitlement subsequent to January 1989.

The hip injury was compatible with the worker's disability. There was continuity of complaint and treatment. The appeal was allowed. [8 pages]

DECISION NO. 783/90 (17/04/91) McIntosh-Janis Jackson Barbeau*Heart attack - Presumptions (section 3).*

The worker suffered a heart attack and died at work on March 15, 1985, when he was 42 years old. He had been off work from March 5 to March 12 because of flu-like symptoms and a sudden onset of pain while loosening a bolt at work. The worker's widow appealed a decision of the Hearings Officer denying lost time benefits from March 5 to March 12 and denying dependency benefits.

The Panel found that the symptoms on March 5 constituted an accident. The worker suffered a heart attack on March 5, although it was unclear whether he suffered a full myocardial infarction at that time. The accident occurred during heavy exertion to loosen a particularly tight bolt. The presumption that the accident arose out of employment was not rebutted. The theory that this attack was a spontaneous non-work-related heart attack was no more than a possibility.

The fatal heart attack on March 15 occurred in the course of employment. Again, the presumption that it arose out of employment was not rebutted. The accident on March 5 had damaged his heart. There was a seasonal increase in work when he returned on March 12. The Panel was not persuaded that the attack resulted from a spontaneous non-work-related cause.

The appeal was allowed. [15 pages]

WCAT Decisions Considered: Decision No. 42/89 (1989), 12 W.C.A.T.R. 85 *reld to*; Decision No. 17/88 *consd*

DECISION NO. 853/90 (17/04/91) Bigras Robillard Seguin

Travel expenses (job search) - Damages (against Board).

The worker suffered an elbow injury in 1982 for which he was awarded a 5% pension in 1984. He received a temporary supplement until 1987. The worker appealed a decision of the Hearings Officer denying entitlement to transportation and telephone expenses incurred from 1982 to 1986 to conduct a job search required by the Board.

There are no provisions in the Act or Board policies to allow reimbursement for such expenses. However, the Panel based its decision denying entitlement on the grounds that the worker did not incur the expenses claimed and did not participate in the job search as claimed.

The worker claimed that he was unfairly placed in the programme. However, the Panel found that the worker never participated in a reasonable manner. Considering the merits and justice of the matter, the Panel found that the worker's claim was frivolous and vexatious. The appeal was dismissed. [21 pages]

DECISION NO. 861/90R (17/04/91) Hartman Lebert Barbeau

Reconsideration.

The worker's request to reconsider Decision No. 861/90 was denied. [4 pages]

WCAT Decisions Considered: Decision No. 95R (1989), 11 W.C.A.T.R. 1 *reld to*; Decisions No. 72R *reld to*, 72R2 *reld to*, 861/90 *consd*

DECISION NO. 111/91 (17/04/91) McIntosh-Janis Robillard Ronson

Negligence - Transfer of costs - Apportionment.

The worker, a truck driver, was employed by Employer 1, a service agency which supplied workers to its customers. The worker was sent to pick up material at the premises of Employer 2.

A fork-lift operator, employed by Employer 2, was loading the material onto the truck when he hit the loading platform with the fork-lift. This caused a chain in the fork-lift to slip off which rendered the fork-lift inoperable. The fork-lift operator summoned his foreman and they attempted to re-engage the chain.

The foreman asked the worker to hold the chain. When the chain snapped back into place, the worker's hand was crushed between the chain and the gears.

The issue was whether there was negligence by Employer 2 or its employees so as to warrant a transfer of costs from Employer 1 to Employer 2. The Panel agreed with the recent trend in the decisions to interpret the concept of negligence, as found in s. 8(9), in the same way as it had developed in the common law.

The fork-lift operator was negligent in operating the fork-lift in such a way as to cause it to collide with the loading dock. He also breached his duty of care to repair the chain in a careful manner by snapping the chain back into place without checking that no one was in the way.

The foreman took on the responsibility of deciding to repair the chain and breached the resulting duty of care to ensure that the repairs were done safely, by failing to adequately supervise the fork-lift operator and the worker. He was also negligent in deciding to proceed with the repairs at all, given that none of the participants were trained in maintaining fork-lifts.

Employer 1 was also negligent, either for failing to make clear to the worker and to Employer 2 that such repairs were not part of the workers's duties, or for failing to provide a properly trained worker, if such repairs were part of the duties. The worker's decision to assist in repairing the chain was ill-advised, but was not negligent. He was entitled to rely on the directions of the foreman and the fork-lift operator.

The Panel found that the negligence of the employees of Employer 2 made a 75% contribution to the occurrence of the accident. Though the Panel had apportioned negligence in this manner, it left apportionment of the costs to the Board's discretion, as additional factors may be pertinent to the apportionment of the costs. [8 pages]

WCAT Decisions Considered: Decision No. 716/87 (1987), 6 W.C.A.T.R. 242 not folld; Decision No. 17/8912 (1990), 13 W.C.A.T.R. 118 reld to; Decision No. 688/89 (1990), 14 W.C.A.T.R. 156 reld to; Decision Nos. 427/89 reld to, 586/89 consd
Cases Considered: Muirhead v. International Coal Mining Co. (1914), 16 D.L.R. 450 reld to

DECISION NO. 114/91 (17/04/91) Onen M. Cook Meslin

In the course of employment (parking lots).

The employer appealed a decision of the Hearings Officer granting entitlement for a hand injury suffered by the worker when she fell in an icy parking lot. The employer leased office space at the back of a lumber store. According to the lease, access to the offices was through a laneway on the south side of the store to the entrance at the rear. Parking for the employer was provided at the rear of the store. There was also access to the offices via a laneway at the north of the store to the rear entrance or through the store itself.

The worker received a lift to work. She got out in the parking lot in the front of the store and was proceeding to the front entrance when she slipped. There was a good relationship between the store and the employer. The store allowed access through the store and allowed workers of the employer to park in the front lot. The employer did not discourage this.

The Panel found that the worker was in the course of employment upon arrival in the front parking lot of the store. The appeal was dismissed. [8 pages]

WCAT Decisions Considered: 674/89 apld
Board Directives and Guidelines: Operational Policy Manual, Document no. 03-02-02

DECISION NO. 197/91 (17/04/91) Onen Jackson Apsey

Access to worker file, s. 77.

Access to the worker's file was granted to the employer. [3 pages]

DECISION NO. 231/91 (17/04/91) Onen Ferrari Apsey

Commutation (home renovation).

The worker appealed a decision of the Hearings Officer denying partial commutation of the worker's pension. The pension was valued at about \$126,000. The worker wanted a partial commutation of about \$68,000 in order to make some repairs to his home, purchase a car and some furniture, pay off some debts and assist his daughter in school.

The worker had a monthly surplus of about \$500. He had a severe arm disability which was deteriorating. If he were to lose his modified job, his employment prospects would be poor. There was no rehabilitative aspect to the commutation. The appeal was dismissed. [5 pages]

Board Directives and Guidelines: Operational Policy Manual, Document no. 05-03-08

DECISION NO. 155/90R2 (18/04/91) Onen Robillard Aspey

Reconsideration - Damages, contribution or indemnity.

The worker's request to reconsider Decision No. 155/90 was denied. Section 8(11) applied to defendants who are not employers. The Panel accepted the interpretation of s. 8(11) as set out in Decision No. 155/90R. [5 pages]

WCAT Decisions Considered: 789/88I consd, 559/89 reld to, 155/90 consd, 155/90R consd

DECISION NO. 856/90I (18/04/91) Onen Robillard Nipshagen

Issue setting - Adjournment (additional issues).

The worker suffered a compensable injury to his low back in April 1988. He claimed that on his return to work, in October 1988, acute back pain caused him to fall and that injuries to his jaw and knee resulted. In March 1990, the worker appealed a decision of the Hearings Officer denying him entitlement for his jaw and knee problems. In May 1990, the Board's Claims Adjudicator, without any request by the worker respecting non-organic disability, decided that the April 1988 injury did not result in any chronic pain or psychotraumatic disability.

The worker indicated that he did not intend to put the non-organic entitlement question in issue on this appeal, but could not say that he would not pursue such a claim in the future. The non-organic disability question concerned much of the same evidence which the Panel would be considering with respect to entitlement for the jaw and knee injuries.

The issue of entitlement for non-organic disability must form part of the issues to be considered in this appeal. The Panel must understand the full nature of the low back disability in order to determine whether it caused the subsequent injuries. Non-organic disability arising out of the April 1988 accident was a possible explanation for the events of October 1988. It thus necessarily formed part of the Hearings Officer's decision.

The employer wished to raise the question of the payment of continuing benefits to the worker, beyond January 1990, for the low back injury. This was a period not close in time to the events of October 1988. Although adding this issue would collapse all disputes into one hearing, the Tribunal generally combines issues only when it is necessary to avoid duplication in adjudication that would necessarily arise, or where the issues were clearly related. The question of continuing entitlement in 1990 was a discrete question to which an answer was not necessary at this time to arrive at a conclusion respecting the question of entitlement for the jaw and knee. The issue of entitlement to benefits in 1990 would not form part of this appeal.

The hearing was recessed, with this Panel being seized of the appeal. [6 pages]

DECISION NO. 100/91 (18/04/91) McIntosh-Janis Robillard Jago

Pensions (assessment) (back) - Pensions (assessment) (neck) - Pensions (assessment) (shoulder).

The worker suffered multiple injuries in an accident. In 1986, he was awarded a 10% pension for low back disability. As a result of a reassessment in 1987, the 10% award for the low back was confirmed and he was awarded an additional 10% for neck disability and 5% for shoulder disability. The worker appealed denial of a higher pension for the neck disability and denial of pensions for arm and leg disabilities.

The Panel confirmed the 5% pension for shoulder disability including involvement of the arm, the 10% pension for neck disability and the 10% pension for low back disability including pain radiating down to the leg.

It appeared that the worker may have a hip disability that was not considered by the Board. The matter was referred back to the Board to consider a possible award for the hip. [9 pages]

WCAT Decisions Considered: Decision No. 915 (1987), 7 W.C.A.T.R. 1 reld to

DECISION NO. 198/91L (18/04/91) Onen Jackson Apsey

Leave to appeal (good reason to doubt correctness) (Appeal Board procedure).

The worker applied for leave to appeal a decision of the Appeal Board. There was good reason to doubt correctness of the Appeal Board decision. After the hearing, the Appeal Board obtained and reviewed the file of a co-worker. The Appeal Board obtained a medical opinion of the co-worker's claim. The medical opinion was sent to the worker for submissions but the co-worker's claim file was not sent to the worker for

submissions. By reviewing additional materials which were not disclosed to the worker, the Appeal Board failed to adhere to the basic principles of a fair hearing.

Leave to appeal was granted. [5 pages]

DECISION NO. 199/91 (18/04/91) McCombie, Shantal Chapman

Access to worker file, s. 77.

Access to the worker's file was granted to the employer. [3 pages]

DECISION NO. 511/88R (22/04/91) Faubert Lebert Jago

Reconsideration.

The worker's request to reconsider Decision No. 511/88 was denied. [4 pages]

WCAT Decisions Considered: 72R2 reld to, 511/88 consd

DECISION NO. 768/90 (22/04/91) Signoroni Higson Meslin

Consequences of injury - Medical report (opinion of treating doctor preferred).

The worker suffered a right eye injury in June 1982, resulting in corneal erosion syndrome and removal of the eye in August 1983. The worker claimed that he developed a cervical strain in September 1983 as a result of increased neck movement. He appealed a decision of the Hearings Officer denying entitlement for the cervical disability.

There were conflicting opinions from two specialists. One stated that loss of one eye would require only a slight increase in neck rotation and that such rotations would only be required infrequently. The other supported the worker's claim, stating that frequent rotation, especially for his job, caused the strain.

The Panel noted that a treating doctor often has an advantage when commenting on certain medical issues. However, the fact that a doctor has examined a worker does not necessarily place that doctor in a better position when commenting on theoretically contentious medical issues once the specific findings of fact are established.

In this case, the supporting medical opinion was based on incorrect information that the worker commenced work in October 1983 rather than October 1984. In addition, the worker's eye had been functionally useless since the accident in 1982. Therefore, there was not a close temporal relationship. Further, the worker had preexisting degenerative disc disease.

The cervical condition was not related to the accident. The appeal was dismissed. [10 pages]

DECISION NO. 32/91 (22/04/91) Bigras Robillard Seguin

Death (suicide) (standard of proof) - Accident (definition of) - Merits and justice.

The worker was an ambulance driver. He died from carbon monoxide poisoning. On the morning of his death, he was in the ambulance garage performing routine inspection of the ambulance and its contents. Part of the inspection was to start the engine, after which it could be turned off immediately. The worker was found in the driver's seat of the ambulance. The motor was running and all doors to the garage were closed. The worker's widow appealed a decision of the Hearings Officer denying dependency benefits.

The coroner and a Ministry of labour inspector found the cause of death to be suicide. The Police found that death was accidental. A different Ministry of Labour inspector found that death may have been due to the worker's negligence.

A deliberate act by the worker to cause his own death would not be considered an accident under the Act. The Panel considered the standard of proof to be applied. In *Beckon v. Ontario*, the Divisional Court found that the standard to be applied in the determination of suicide at a coroner's inquest, a civil proceeding, was the criminal standard of beyond a reasonable doubt. This was due to the serious consequences of a finding of suicide for both the living and the deceased. The Panel agreed and found that the real merits and justice in s. 3(4) provided statutory support for this view.

The worker had emotional and psychological problems, including suicidal ideas, which required psychiatric treatment, follow-up and medication. He was in a depressed state for a week prior to his death. However, he had not expressed suicidal tendencies for at least one year prior to his death. There was no suicide note and there were certain other factors that were not indicative of suicide. There was a possibility that the worker may have caused his death by carelessness, or absent-mindedness, induced by a deep depressive mood.

It could not be established beyond a reasonable doubt that the worker did not die as a result of carelessness due to his deep depressive mood. The Panel found that the worker died by accident. The accident occurred in the course of employment. The presumption applied that it arose out of employment. The appeal was allowed. [26 pages]

WCAT Decisions Considered: Decision No. 298/88 (1988), 9 W.C.A.T.R. 281 reld to

Cases Considered: *Beckon v. Ontario* (Deputy Chief Coroner), (March 28, 1990) (Ont. Div. Ct.) (unrep.) apld

DECISION NO. 845/88R (23/04/91) Starkman Higson Apsey

Reconsideration (new evidence) - Penalties - Board Directives and Guidelines (penalty assessments) (distortions).

The employer requested reconsideration of Decision No. 845/88, in which a 100% penalty assessment for the years 1983-85 was confirmed. The employer submitted that two claims distorted the employer's accident cost record for those years.

This issue was not raised at the original hearing, where the employer was represented by its general manager. The reconsideration request was filed by a professional representative. In the circumstances, the Panel did not feel that the employer was trying to take advantage of the process by splitting its arguments.

The Panel agreed that the accident cost record was distorted by the two claims. However, the employer did not pay sufficient attention to health and safety matters during the years in question. The Panel reduced the penalty assessment to 50%. The reconsideration request was allowed in part. [4 pages]

WCAT Decisions Considered: Decision No. 845/88 (1989), 11 W.C.A.T.R. 154 coned

DECISION NO. 441/89 (23/04/91) Bradbury -B. Cook Seguin

Out of province (payment of benefits) (worker ceasing to reside in Ontario) - Statutory interpretation (principles of) (strained construction) - Charter of Rights (mobility rights).

The worker suffered a compensable recurrence of an injury after he had moved to Newfoundland. The Panel considered the application of s. 13, which provides that, if a worker receiving a periodical payment ceases to reside in Ontario, he is not thereafter entitled to receive such payment unless the disability is likely to be permanent. The case also potentially raised the issue of mobility rights under the Charter of Rights.

The employer submitted that s. 13 was applicable. The worker submitted that s. 13 applied only to workers receiving benefits at the time they leave Ontario and that, therefore, the section did not apply in this case. The Board submitted that the plain grammatical meaning would create different classes of workers distinguished only on the basis of when they receive benefits and on the basis of prior residence in Ontario.

Such a reading would lead to inconsistent results in cases with marginally different facts. The Board therefore submitted that a strained construction of s. 13 should be adopted so that the section applied only to workers ceasing to reside in Ontario in circumstances such that the Board could not adequately determine the existence and degree of disability.

The Panel was not satisfied that a strained construction was justified. The consequences of the grammatical interpretation in this case were not so undesirable or repugnant that the ordinary meaning should be abandoned. However, the Panel noted that a different panel concerned with different facts may have to consider Charter implications.

The worker received benefits until 1974. He moved to Newfoundland in 1976 and suffered the recurrence in 1980. Section 13 was not applicable since the worker was not receiving benefits at the time he ceased to reside in Ontario. The Board initially found that the worker was entitled to benefits for the recurrence and paid those benefits under s. 47, which provides a method for paying benefits to workers who do not live in Ontario, once it has been decided that they are entitled to benefits. The Panel concluded that the worker was entitled to those benefits payable in that manner. [8 pages]

Other Statutes Considered: Canadian Charter of Rights and Freedoms, s. 6

Appendices: Board Submissions Regarding Interpretation of s. 13 of the Workers' Compensation Act

DECISION NO. 496/90 (23/04/91) Kenny Drennan Jago

Suitable employment - Rehabilitation, vocational (cooperation).

The worker suffered a back sprain on January 5, 1989. He returned to modified work cleaning lathes on

January 23, 1989, but was sent home the same day for failure to wear safety boots. The worker claimed that the job was not within his medical restrictions against bending and heavy lifting. The employer appealed a decision of the Hearings Officer granting temporary benefits subsequent to January 23.

The Panel found that the job did cause back problems for the worker and that he likely would not have been able to continue regardless of whether he had safety boots. The job was not suitable for the worker.

Further, the worker did not fail to cooperate with rehabilitation. It was not unreasonable for the worker to assume that the employer did not have other light jobs. The employer had not previously had anyone on modified work and the supervisor did not actually know if there was any other job that could have been offered to the worker. In any event, the possibility that the employer might have had some other modified work which it did not offer to the worker did not mean that the worker failed to cooperate or be available.

The appeal was dismissed. [11 pages]

WCAT Decisions Considered: Final Decision No. 2 (1987), 4 W.C.A.T.R. 1 *reld to*; Decision No. 59 (1987), 5 W.C.A.T.R. 17 *reld to*; Decision No. 121 (1986), 3 W.C.A.T.R. 81 *reld to*; Decision No. 137 (1987), 4 W.C.A.T.R. 87 *reld to*; Decision No. 529/87 (1987), 6 W.C.A.T.R. 158 *reld to*; Decision No. 548/87 (1987), 5 W.C.A.T.R. 176 *reld to*; Decision No. 539/89 (1989), 12 W.C.A.T.R. 208 *reld to*; Decisions No. 159 *reld to*, 1005/87 *reld to*, 1214/87 *reld to*, 57/88 *reld to*, 187/88 *reld to*, 196/88 *reld to*, 533/88 *reld to*, 958/89 *reld to*

DECISION NO. 51/91 (23/04/91) Sandomirsky Lebert Seguin

Temporary disability (beyond pension level).

The worker suffered a shoulder injury in 1984 for which he was awarded a 5% pension. The worker appealed a decision of the Hearings Officer denying entitlement to temporary benefits in 1989. The worker claimed that he sprained his shoulder at work on April 18, 1989, although he did not stop working until April 24.

On the evidence, the worker was not disabled beyond his pension level. The appeal was dismissed. [7 pages]

DECISION NO. 167/91 (23/04/91) McGrath B. Cook Nipshagen

Access to worker file, s. 77.

Access to the worker's file was granted to the employer. The Panel noted Board policy prohibiting subsequent disclosure without removing references to the worker's identity. [3 pages]

Board Directives and Guidelines: Operational Policy Manual, Document no. 01-04-11

DECISION NO. 176/91 (23/04/91) McGrath B. Cook Nipshagen

Access to worker file, s. 77.

Access to the worker's file was granted to the employer. [3 pages]

DECISION NO. 211/91 (23/04/91) McCombie Lebert Jago

Aggravation (preexisting condition) (disc, degeneration) (cervical).

The worker suffered a severe laceration of the forearm and a cervical disability in an accident in July 1985. The worker appealed a decision of the Hearings Officer denying entitlement for a cervical disability subsequent to November 1986.

The Panel found that the worker suffered a minor aggravation of preexisting asymptomatic cervical degenerative disc disease in the compensable accident. His condition had not returned to its pre-accident state. The appeal was allowed. [8 pages]

Board Directives and Guidelines: Operational Policy Manual, Document no. 08-01-05

DECISION NO. 251/91 (23/04/91) Sandomirsky Felice Apsey

Withdrawal (of appeal).

The appeal was withdrawn to allow the worker to pursue other issues at the Board. [3 pages]

DECISION NO. 341/90I (24/04/91) McGrath Fox Barbeau

Temporary disability (beyond pension level) - Aggravation (compensable injury).

The worker had suffered compensable injuries for which he was receiving a 30% pension for low back disability and a 25% pension for cervical disability. In April 1986, the worker was pushed backwards at work. The worker appealed a decision of the Hearings Officer denying further entitlement to temporary benefits resulting from the incident in April 1986.

The Panel found that the worker aggravated his neck disability in April 1986. There was medical opinion that there was no further organic deterioration of the worker's condition. However, this did not necessarily mean that the worker's symptoms remain unchanged. Just as an accident can make an underlying asymptomatic condition symptomatic without increasing the actual organic disability, so can this worker's accident increase symptoms of his organic disabilities without an accompanying organic deterioration. The Panel found that the worker was totally disabled from April 1986 to December 1986.

The Panel referred the case back to the Board for reassessment of pension for the following conditions: deterioration of neck, arm and hand disability and possible deterioration of the low back disability;

ulcerated stomach and angio-edema which were consequences of medication and treatment; multiple factors; chronic pain. The Panel would issue a final decision after reviewing the assessment by the Board. [10 pages]

DECISION NO. 11/91 (24/04/91) Starkman McCombie Barbeau

Suitable employment.

The worker's right index finger was amputated in an accident in September 1987. The worker appealed a decision of the Hearings Officer denying temporary benefits subsequent to August 1987 for failure to accept suitable employment.

A board rehabilitation counsellor and the worker's treating doctors were of the opinion that modified work tinting paint that was offered by the employer was suitable. The appeal was dismissed. [5 pages]

DECISION NO. 234/91I (24/04/91) Kenny Beattie Nipshagen

Three week rule (submissions) - Three week rule (documents) - Three week rule (Board decision).

The worker was appealing a decision denying entitlement for hearing loss.

At the beginning of the hearing, the worker asked the Panel to consider a Board decision regarding a co-worker's claim for hearing loss. The worker had not received the decision until less than one week before the hearing.

Decisions are usually considered by Tribunal panels even though they do not comply with the three week rule since they are generally submitted as part of the argument of the appeal rather than as part of the factual evidence. However, in this case, the decision related to a co-worker and would have enlarged the factual issues in the appeal by, potentially, requiring the employer to distinguish between the worker and the co-worker. The Panel decided not to admit the decision.

During closing argument, the employer referred to noise level tests which were not in evidence. The Panel noted the distinction between evidence and argument. Evidence is testimony or documentation presented to prove the facts which are in dispute. In argument, the parties attempt to persuade a panel that certain conclusions should be drawn from the evidence which has already been produced and subjected to scrutiny. It is not appropriate to introduce new evidence as part of argument. The Panel was satisfied that the employer was simply unaware of the distinction.

The evidence was relevant. The Panel decided to admit the tests and gave the parties opportunity to make submissions. [7 pages]

[End of volume]

Workers' Compensation Appeals Tribunal

Decision Digest Service

Volume 1

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Workers' Compensation Appeals Tribunal

Decision Digest Service

Volume 1

Annotated Statute

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Under each section heading is a list of decisions specifically referring to that section. Beside the decision number are all the relevant sections in the Annotated Statute where the decision is entered. Summaries of all decisions in the Annotated Statute will be found in the attached Summaries section. To find decisions without section numbers, refer to the Keyword Index under the appropriate subject matter.

All section numbers refer to the sections of the Workers' Compensation Act as amended, unless otherwise noted. Amendments to the Act which were proclaimed on January 2, 1990, have repealed and replaced several sections of the Act. For example, s.45 of the pre-1989 Act dealt with permanent disability. As a result of the amendments, s.45 deals with non-economic loss. In this Annotated Statute, "Section 45" refers to the new non-economic loss provisions and "Section 45 pre-1989" refers to the old permanent disability provisions.

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